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No. 85-1933

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

BOUND BROOK ASSOCIATION, *et al.*,
Petitioners,

vs.

CITY OF NORWALK, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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85-P

Question Presented for Review

Did the Connecticut Supreme Court violate the petitioners' right to due process as secured by the Fourteenth Amendment to the Constitution of the United States by reversing a jury verdict in favor of the petitioners solely on factual determinations?

Table of Contents.

	Page
Question Presented for Review	i
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	17
I. The decision of the Connecticut Supreme Court reversing the jury verdict solely on factual determinations has denied petitioners their right to due process as secured by the Fourteenth Amendment to the Constitution of the United States	17
A. The right to trial by jury has historically been considered a fundamental right in our system of justice	17
B. The Connecticut Constitution provides that the right of trial by jury shall remain inviolate	21
C. The right to due process as secured by the Fourteenth Amendment incorporates the right to a trial by jury	22

Page

D. In State Court actions involving the litigation of Federal rights, the Supreme Court has preserved the jury's factual findings and has reversed the actions of Appellate Courts which have attempted to substitute their own factual findings for those of the jury 26

E. The Court should promote the confidence of litigants in State Courts 28

Conclusion 29

Table of Contents to Appendix.

Decision of the Connecticut Supreme Court 1a

Order of the Connecticut Supreme Court denying Motion to Reargue 12a

Picture of the Shaw house, 46 Marlin Drive, Norwalk, Connecticut 14a

Picture of the Troy house, 53 Marlin Drive, Norwalk, Connecticut 15a

Interrogatories as completed by the jury 16a

Table of Authorities.

CASES:

Adamson v. California, 332 U.S. 46 (1947) 23

Aetna Life Ins. Co. v. Lavoie, No. 84-1601 (April 22, 1986), ____ U.S. ____ (1986) 9, 25, 28

Page

Anderson, Admin. v. Atlantic Coast Line R. Co., 350 U.S. 807 (1955) 28

Beacon Theatres v. Westover, 359 U.S. 500 (1959) 20

Bound Brook Association, *et al.* v. City of Norwalk, *et al.*, 198 Conn. 660, ____ A.2d ____ (1986) 2

Camp v. Booth, 160 Conn. 10, 273 A.2d 714 (1970) 22

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) 26

Dacey v. Connecticut Bar Assn., 170 Conn. 520, 368 A.2d 125 (1976) 12

DeLuca v. C.W. Blakeslee & Sons, Inc., 174 Conn. 535, 391 A.2d 170 (1978) 10

Dimick v. Schiedt, 293 U.S. 474 (1935) 20

Duncan v. Louisiana, 391 U.S. 145 (1960) 23, 24

Frankovitch v. Barton, 185 Conn. 14, 440 A.2d 254 (1981) 15

Gallick v. Baltimore & Ohio R. R. Co., 372 U.S. 108 (1963) 26, 27

Gibson v. Phillips Petroleum Co., 352 U.S. 874 (1956)... 28

Gideon v. Wainwright, 372 U.S. 335 (1963) 24

Gitlow v. New York, 268 U.S. 652 (1925) 23

Griffin v. Nationwide Moving & Storage Co., 187 Conn. 405, 446 A.2d 799 (1982) 12

Page

Harsh v. Illinois Terminal R. R. Co., 348 U.S. 940 (1955) 27

In Re Oliver 333 U.S. 257 (1948) 24

Jacob v. City of New York, 315 U.S. 752 (1942) 20

Kalleher v. Orr, 183 Conn. 125, 438 A.2d 843 (1981) 12

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 24

Lavender v. Kurn, 327 U.S. 645 (1946) 27

Leabo v. Leninski, 182 Conn. 611, 438 A.2d 1153 (1981) . 12

McDonald v. Haynes Medical Laboratory, Inc., 192 Conn. 327, 471 A.2d 646 (1984) 7

Melancon v. McKeithen, 345 F. Supp. 1025 (E.D.La. 1973), aff'd *sub nom.* Hill v. McKeithen, 409 U.S. 943 (1972) 28

Palko v. Connecticut, 302 U.S. 319 (1937) 23

Patterson v. New York, 432 U.S. 197 (1977) 25

Parsons v. Bedford, *et al.*, 3 Pet. 433, 7 L.Ed. 732 (1830) . 19

Powell v. Alabama, 287 U.S. 45 (1932) 24

Puro v. Henry, 188 Conn. 301, 449 A.2d 176 (1982) 11, 16

Ricciuti v. Voltarc Tubes, Inc., 277 F. 2d 809 (2d Cir. 1960) 7

Robertson v. Apuzzo, 170 Conn. 367, 365 A.2d 824 (1976) 21

Page

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957) 26, 27

Sauro v. Arena Co., 171 Conn. 168, 368 A.2d 58 (1976) .. 12

Seals v. Hickey, 186 Conn. 337, 441 A.2d 604 (1982) 21

Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957) . 27

Speiser v. Randall, 357 U.S. 513 (1958) 25

Swafford v. Atlantic Coast Line R. Co., 350 U.S. 807 (1955) 28

Tennant v. Peoria & P.U.R. Co., 321 U.S. 29 (1944) 27

Tomczuk v. Alvarez, 184 Conn. 182, 439 A.2d 935 (1981) 16

Twining v. New Jersey, 211 U.S. 78 (1908) 23

Union Trust Co. v. Eastern Airlines, Inc., 350 U.S. 907 (1955) 28

United States Trust Co. v. Bohart, 197 Conn. 34, 495 A.2d 1034 (1985) 28

Williams v. Carolina Life Ins. Co., 348 U.S. 802 (1954) .. 28

Zapolsky v. Sacks, 191 Conn. 194 (1983) 10

STATUTES:

Conn. Gen. Stat. §52-577 7

Conn. Gen. Stat. §52-584 7

Conn. Gen. Stat. §52-595 ..... 3, 8, 9

Page

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. XIV, §1 ..... 3, 10, 22, 23

Conn. Const. art. First, §19 ..... 3, 21

TEXTS:

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1 Journals of Congress 28 18

Simon, The Jury System In America (1st ed. 1975) 17

NO.

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OCTOBER TERM, 1985.

BOUND BROOK ASSOCIATION, *et al.*,

Petitioners,

vs.

CITY OF NORWALK, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI.

The petitioners[1] respectfully pray that a writ of certiorari issue to review the decision of the Connecticut Supreme Court dated February 18, 1986 and the denial of the petitioners' Motion to Reargue dated March 4, 1986.

[1]The petitioners are: Fernand Andre, Lea Andre, Raymond Bonefant, Linda Bonefant, Ferdinand Caban, Marie Caban, John Charity, Mary Charity, William Chiappetta, Paula Chiappetta, Arline Ciafullo, Ronnie Coley, Mary Coley, Curtis Collins, Mary Collins, Edward Crozier, Moses Davis, Lila Davis, Carlo DeMichael, Carolyn DeMichael, Angelo DiMeglio, Ester DiMeglio, Carl Dulberg, Janice

(Footnote continued on following page.)

Opinions Below.

The decision of the Connecticut Supreme Court is reported at 198 Conn. 660, ____ A.2d ____ (1986), and is set forth in the appendix (1a). The order denying the petitioners' Motion to Reargue was issued by the Connecticut Supreme Court without opinion and was not reported (12a).

Jurisdiction.

The decision of the Connecticut Supreme Court is dated February 18, 1986 and the denial of the petitioners' Motion to Reargue is dated March 4, 1986. Jurisdiction to review the judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. §1257(3).

(Footnote continued.)
Dulberg, Sara Gerardi, Jorge Gonzales, Martha Gonzales, Celestino Heres, Elsa Heres, Nathan Housey, Timothy Hushion, Patricia Lockwood, Salvatore Ieva, Jeanne Ieva, Andras Kenderisi, Helen Kenderisi, Allen Knox, Elizabeth Knox, Carl Lewis, Althea Lewis, Frank Lopresti, Ann Lopresti, Juan Loquine, Miriam Loquine, Richard Marcy, Mary Ann Marcy, Augustus Moore, Jr., Carri Moore, James Mouzon, Hilda Mouzon, David Nial, Susan Nial, Elizabeth Page, Marie Passaniti, Jane Reichle, Jack Robertino, Josephine Robinson, William Rouzier, Sharon Rouzier, Anthony Sabia, Dorothy Sabia, John Santagata, Sonia Santagata, Louis Sciglimpaglia, Jo Ann Sciglimpaglia, Donnie Sellers, Arneita Sellers, Cane Shaw, Viola Shaw, William Summerville, Thelma Summerville, Njall Svege, Alice Svege, Charles Taylor, Jr., Kathleen Troy, Charles Vines, Hattie Vines, Palmer Ware, Brenda Ware, Levi Whittingham, Simeriah Whittingham, Joan Zurell.

The respondents are: The City of Norwalk, Connecticut and William R. Guarnieri (hereinafter sometimes collectively referred to as "the respondents").

The other defendants in the action Bound Brook Association, *et al.* v. City of Norwalk, *et al.* are Bound Brook Estates, Inc., Raymond Wennik, Harry E. Bryan and Louis J. Gardella, Inc.

A settlement was reached with Bound Brook Estates, Inc. and Raymond Wennik during the pendency of the appeal. Harry E. Bryan died prior to trial and his executors were substituted as defendants. The substituted defendants failed to appear at trial, a default was entered and a hearing in damages was held by the trial court. The jury returned a verdict in favor of Louis J. Gardella, Inc.

Provisions Involved.

Constitution of the United States, Amendment XIV

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Connecticut
Article 1, Section 19

The right of trial by jury shall remain inviolate.

Conn. Gen. Stat. §52-595. Fraudulent concealment of cause of action.

If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.

Statement of the Case.

The petitioners commenced this action against the City of Norwalk, William R. Guarnieri, Bound Brook Estates, Inc., Raymond Wennik, Louis J. Gardella, Inc. and Harry E. Bryan based on common law tort. The petitioners' homes in Bound Brook Estates, Norwalk, Connecticut are structurally defective and are sinking. (See representative photographs in Appendix at 14a, 15a.) The untreated wood pilings supporting the houses do

not comply with the Basic Building Code of the State of Connecticut (hereinafter "the Building Code").

Bound Brook Estates is an inter-racial, multi-ethnic community in Norwalk, Connecticut.[2] Many of the petitioners are first time homeowners who have worked hard for a home of their own. When they purchased their homes in Bound Brook Estates, the petitioners thought they were buying a piece of the American dream, a house with a yard in a suburban development; a house certified by the City of Norwalk as built in compliance with the Building Code; a mortgagable investment for the future; a home. The petitioners' dreams have turned to disappointment. The petitioners now find themselves, after a strange legal odyssey, petitioning the United States Supreme Court for justice.

Respondent Guarnieri was the Chief Building Inspector of the City of Norwalk from 1958 until 1977. Raymond Wennik is the President of Bound Brook Estates, Inc., the builder of the petitioners' homes. Louis J. Gardella, Inc. was the pile driver on the Bound Brook job. Harry E. Bryan was a professional engineer retained by Bound Brook Estates, Inc.

In and around 1965, Wennik and Bound Brook Estates, Inc. acquired a tract of undeveloped land in the City of Norwalk. Portions of the tract were composed of soft, wet, marshy, shifting and unstable soils. The site has a variable or fluctuating water table.

The Planning Commission and Common Council of the City of Norwalk approved a subdivision of the tract into residential building lots (hereinafter "the Bound Brook subdivision"). After the approval of the subdivision, Bound Brook Estates,

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[2]The U.S. Department of Commerce reports that the Norwalk Standard Metropolitan Statistical Area ("SMSA") has the third highest housing costs in the nation after the Stamford, Connecticut SMSA and the Honolulu, Hawaii SMSA.

Inc. placed substantial amounts of fill in the swampy areas of the site in anticipation of constructing roads and houses in the subdivision.

Raymond Wennik determined with the assistance of Harry E. Bryan that many of the houses in the Bound Brook subdivision would have to be constructed on pilings. Wennik, Respondent Guarnieri and Bryan met at the offices of the Building Department of the City of Norwalk prior to the commencement of construction for the purpose of discussing the construction of the houses in the Bound Brook subdivision. At the meeting, Respondent Guarnieri approved the use of untreated wooden pilings. No boring tests were conducted, no soils tests were made and no determinations were made concerning the level of the ground water on the site.

Each of the petitioner's houses is constructed on thirteen untreated wooden pilings. The records of the Building Department of the City of Norwalk document that a building permit was issued, that footing and foundation inspections were conducted by an employee of respondent City of Norwalk and that a certificate of occupancy was issued for each of the petitioner's houses.

At trial, the petitioners presented the testimony of a number of expert witnesses, including two professional engineers specializing in soils and soils engineering—Lawrence Buckley and David Thompson.

Mr. Buckley testified that it would be unacceptable to use untreated timber pilings, if the pilings were to extend above the water table, and that untreated wooden pilings should not be used where there is a changing water table. Mr. Buckley observed several of the pilings at the Bound Brook subdivision in 1977 and again in 1982. In discussing his observations, Mr. Buckley stated that the pilings were untreated wood, extended above the water table and some showed visible evidence of decay. He stated that the use of untreated wooden pilings to support a house in a situation where those pilings extended

above the water table would be a substantial factor in the creation of a structural problem relating to the house. Mr. Buckley recommended that all of the petitioners' houses constructed on untreated wooden pilings be repiled.

Mr. Thompson discussed the three reasons for the decay of an untreated timber piling—bacterial action, attack by fungi and attack by insects. When an untreated wooden piling decays, the strength of the wood is broken down and the piling loses its ability to support a load. In Mr. Thompson's opinion, the pilings supporting the petitioners' houses will have a useful life of 14 to 25 years. If even one of the thirteen pilings supporting each of the petitioner's houses decays, the house will settle, cracks will develop and the framing will distort.

In 1969, Wennik discovered that four of the houses in the Bound Brook subdivision showed signs of settlement. Three of these houses were removed from their foundations, and new piles were driven. One of the houses was repiled twice, the second time with steel piles. Respondent Guarnieri knew about the repiling of the houses. While the repiling of a house would require a building permit, no permits were issued for the repiling at Bound Brook.

The petitioners purchased their houses in the Bound Brook subdivision between 1969 and July, 1977. A member of each of the petitioner households testified that they purchased the land and structures which are the subject of this action as a primary residence for themselves and their families. The petitioners were shown their homes by various members of the Norwalk Board of Realtors. Each of the petitioners obtained mortgage financing to assist him with the purchase of his home. Each of the petitioners had an inspection of the premises made by a professional house inspector or relied on his mortgage lender to conduct an inspection. Each of the petitioners used the services of an attorney to assist him with the purchase of his home.

In September 1976, the ground floor of the house at 24 Southwind Drive owned by a family named Mazzello (not in-

volved in this action) collapsed. The house was declared unsafe by the City of Norwalk, and the owners were required to vacate the structure. After the collapse of the Mazzello house, certain of the petitioners asked the Common Council of the City of Norwalk to conduct an engineering study of the houses in the Bound Brook subdivision. The petitioners wanted the engineering study in order to demonstrate that their houses were structurally sound and to show that the failure of the Mazzello house was an isolated occurrence.

The City of Norwalk retained Lawrence Buckley, P.E. to conduct a study of the houses in the Bound Brook subdivision. Mr. Buckley submitted his report to the Health Welfare and Public Safety Committee of the Norwalk Common Council on October 6, 1977.

Petitioners commenced this action by complaint dated September 19, 1978. The petitioners claimed that the defendants City of Norwalk, Guarnieri, Bound Brook Estates, Inc., Wennik and Bryan were liable for negligence, negligent nuisance, absolute nuisance and fraudulent representations and reckless misrepresentations. The plaintiffs claimed that defendant Louis J. Gardella, Inc. was liable for negligence, negligent nuisance and absolute nuisance.

The respondents, by special defense, alleged that the petitioners' claims were barred by the statute of limitations.[3] The petitioners, in reply thereto, claimed that the respondents con-

[3]The Connecticut Statute of Limitations (Sections 52-577 and 52-584 of the Connecticut General Statutes) requires that an action be commenced within three years from the act or omission complained of. The Connecticut statute is a statute of repose and the statute can run before a plaintiff discovers the existence of a cause of action. *See e.g. McDonald v. Haynes Medical Laboratory, Inc.*, 192 Conn. 327, 471 A.2d 646 (1984).

The Connecticut Statute of Limitations was criticized by the Second Circuit Court of Appeals in *Ricciuti v. Voltarc Tubes, Inc.*, 277 F. 2d 809 (2d Cir. 1960). In *Ricciuti,* the plaintiff was exposed to beryllium dust from 1944 to 1948. In 1953, the plaintiff contracted berylliosis.
(Footnote continued on following page.)

cealed the existence of petitioners' causes of action.[4]

Jury selection started on September 13, 1982 and lasted ten weeks. On November 19, 1982, the jury was sworn and testimony began.

On February 14, 1983, after more than three months of trial and the testimony of more than 70 witnesses, the Court instructed the jury. At the conclusion of its charge, the Court submitted interrogatories to the jury. The jury's responses to these interrogatories provide an opportunity to observe the jury's thinking and to understand the rationale for their verdict. Moreover, the consistency of the jury's responses to the Court's interrogatories demonstrates the depth of their understanding of the issues in this case. Interrogatories were returned by the jury for each petitioner household. (Representative interrogatories are reprinted in the Appendix at 16a.)

(Footnote continued.)
The disease was diagnosed in January 1956, and the plaintiff brought suit in December 1957. The Court of Appeals, in interpreting the Connecticut statute of limitations, held:

> We think it is unreasonable to hold that the statute of limitations begins to run against an injured person at a time when he does not in fact know and could not with the exercise of reasonable care and diligence, know what his injury is. To so hold would nullify any right to recover for any serious but slowly developing diseases.

Id. at 813.

[4]Section 52-595 of the Connecticut General Statutes enables a plaintiff who can plead and prove fraudulent concealment to avoid the harshness of the statute of limitations. Section 52-595 states:

> If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.

After ten days of deliberation and after completing over 5,000 interrogatories, the jury returned a verdict in favor of the petitioners against the respondents City of Norwalk and William R. Guarnieri, defendant Bound Brook Estates, Inc. and defendant Raymond Wennik. The jury returned a verdict in favor of Louis J. Gardella, Inc. The jury awarded each of the 47 petitioner households compensatory damages ranging from $8,000.00 to $61,231.00.

The defendants' motions to set aside the verdict and to enter judgment notwithstanding the verdict were denied and the trial court entered judgment in favor of the petitioners.

On appeal, the Connecticut Supreme Court set aside the judgment and remanded the case to the trial court with instructions to render judgment in favor of respondents City of Norwalk and Guarnieri. The Connecticut Supreme Court found that the jury could not have reasonably concluded that the respondents had intended to conceal from the petitioners the existence of the petitioners' causes of action. The Connecticut Supreme Court held that lacking a demonstration of an intent to conceal the petitioners' causes of action, there could be no proof of fraudulent concealment pursuant to Section 52-595 of the Connecticut General Statutes. Without proof of fraudulent concealment, the Connecticut Supreme Court determined that the statute of limitations barred the petitioners' causes of action.

The petitioners respectfully submit that the Connecticut Supreme Court has invaded the fact finding prerogatives of the jury and has denied the petitioners' fundamental rights as secured by the Fourteenth Amendment to the Constitution of the United States.

This issue was raised before the Connecticut Supreme Court on a motion to reargue after the Connecticut Supreme Court overturned the petitioners' jury verdict. The petitioners' motion to reargue was denied without opinion. Accordingly, this Court has jurisdiction over the issues raised herein. *See e.g. Aetna Life Ins. Co. v. Lavoie,* No. 84-1601 (April 22, 1986), ____ U.S. ____ (1986).

In Connecticut, it is well settled that the determination of a question of fraudulent intent "is clearly an issue of fact which must often be inferred from surrounding circumstances." "Such a fact is not ordinarily proven by direct evidence, but rather, by inference from other facts proven—the indicia or badges of fraud." *Zapolsky v. Sacks,* 191 Conn. 194, 200, 464 A.2d 30 (1983). In *Zapolsky v. Sacks,* 191 Conn. at 201, the Connecticut Supreme Court concluded that "a factual finding based on inferences reasonably drawn from the evidence will stand."

As the Connecticut Supreme Court stated in *DeLuca v. C.W. Blakeslee Sons, Inc.,* 174 Conn. 535, 546-7, 391 A.2d 170 (1978):

> The intent to defraud involves a state of mind and "must usually, as was the case here, be proven by circumstantial evidence." *Busker v. United Illuminating Co., supra,* 459; *Paul Bailey's, Inc. v. Commissioner of Motor Vehicles,* 167 Conn. 493, 498, 356 A.2d 114. As we noted in *State v. Vars,* 154 Conn. 255, 263, 224 A.2d 744: " 'A question of intent is a question of fact, the determination of which is not reviewable unless the conclusion drawn by the trier is one which cannot reasonably be reached.' *International Brotherhood v. Commission on Civil Rights,* 140 Conn. 537, 543, 102 A.2d 366. Intention is a mental process and of necessity it must be proved by the statement or acts of the person whose act is being scrutinized. *State v. Mazzadra,* 141 Conn. 731, 735, 109 A.2d 873. 'A person's intention in any regard is to be inferred from his conduct'; *Kiernan v. Borst,* 144 Conn. 1, 6, 126 A.2d 569; and ordinarily can be proven only by circumstantial evidence. *State v. Sul,* 146 Conn. 78, 87, 147 A.2d 686."
>
> Upon conflicting evidence, it is peculiarly within the province of the trier of fact to judge the credibility of the witnesses and then draw proper inferences. *Kukanskis v. Jasut,* 146 Conn. 78, 87, 147 A.2d 686."

Similarly, in *Puro v. Henry,* 188 Conn. 301, 310-11, 449 A.2d 176 (1982) (emphasis added), the Connecticut Supreme Court stated:

> "The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence; circumstantial evidence may be sufficient." 37 Am. Jr. 2d, Fraud and Deceit §439, p. 599. *See Console v. Nickou, supra,* 275, wherein we stated: " 'The test of the sufficiency of proof by circumstantial evidence is whether rational minds could reasonably and logically draw the inference. *Andrea v. New York, N.H. & H.R. Co.,* 144 Conn. 340, 344, 131 A.2d 642 (1957); *Pierce v. Albanese,* 144 Conn. 241, 256, 129 A.2d 606, appeal dismissed, 355 U.S. 15, 78 S. Ct. 36, 2 L.Ed. 21 (1957). The proof need not be so conclusive that it precludes every other hypothesis. It is sufficient if the proof produces in the mind of the trier a reasonable belief that it is more probable than otherwise that the fact to be inferred is true. *Hennessey v. Hennessey,* [145 Conn. 211, 214, 140 A.2d 473 (1958)]; *Pierce v. Albanese, supra*; *Dickson v. Yale University,* 141 Conn. 250, 253, 105 A.2d 463 (1954, and cases cited.' *Cayer v. Salvatore,* 150 Conn. 361, 364, 189 A.2d 505 (1963)."
>
> *Each inferential fact need not be proven by the quantum of proof required to find the ultimate fact. If the jury could reasonably have reached the conclusion that the cumulative effect of the facts they found proven established the fraudulant concealment that would be sufficient. Cf. State v. Hayes,* 127 Conn. 543, 554, 18 A.2d 895 (1941); *State v. Olavieri,* 123 Conn. 678, 679-80, 195 A. 181 (1937); see also, *State v. Johnson,* 162 Conn. 215, 231-32, 292 A.2d 903 (1972); *State v. Gallivan,* 75 Conn. 326, 329, 53 A. 731 (1902).

It is within the province of the jury to draw reasonable and logical inferences from the facts proven. *See Dacey v. Connecticut Bar Assn.*, 170 Conn. 520, 540, 368 A.2d 125 (1976).

On innumerable occasions, it has been stated by the Connecticut Supreme Court that the Court cannot retry facts or pass on the credibility of witnesses. *See Griffin v. Nationwide Moving & Storage Co.*, 187 Conn. 405, 422, 446 A.2d 799 (1982). The credibility of witnesses and the weight to be accorded to the evidence are within the province of the trier of fact. *See Leabo v. Leninski,* 182 Conn. 611, 616, 438 A.2d 1153 (1981).

Moreover, the decision of the trial court in refusing to set aside the verdict or to enter judgment notwithstanding the verdict is entitled to great weight. The Connecticut Supreme Court has consistently held that:

> The concurrence of the judgments of the judge and the jury who saw the witnesses and heard the testimony, is a powerful argument for sustaining the action of the trial court.

See Sauro v. Arena Co., 171 Conn. 168, 169, 368 A.2d 58 (1976). The conclusion of the judge who presided at the trial and denied a motion to set aside the verdict is significant because the trial judge had an opportunity "to evaluate the evidence and to sense the tenor of the trial." *Kalleher v. Orr,* 183 Conn. 125, 127, 438 A.2d 843 (1981).

The jury had before it clear, precise and unequivocal evidence from which it could reasonably infer the respondents' intent to conceal the petitioners' causes of action. The jury heard the following evidence and made a finding of intent to conceal:

1. The Bound Brook site was composed of wet, marshy, shifting and unstable soils. This condition was evident to even a casual observer.

2. The City Planning Commission, the City Engineer and the Building Department of the City knew that the Bound Brook site had building limitations.

3. Respondent Guarnieri was so familiar personally with the site that he called a meeting with developer Raymond Wennik and his engineer, Harry E. Bryan, to discuss the foundations necessary to support the petitioners' homes.

4. While respondent Guarnieri had no formal training in architecture and engineering, it took no special training for him to know that the Bound Brook site required special care.

5. Respondent Guarnieri knew the provisions of the Building Code as it related to piled foundations. During his testimony, holding a copy of the Building Code to his breast, he looked at the jury and told them that the Code was "his Bible."

6. At the meeting that respondent Guarnieri called with Messrs. Wennik and Bryan, the use of untreated piles to support the petitioners' homes was approved.

7. The Building Code required in simple, mandatory language that an obvious swamp like the Bound Brook site had to be investigated prior to permitting construction. The Code required, among other things:

a) investigation of subsurface soil conditions through test borings. Section 724 and 736.1 of the Building Code.

b) that untreated pilings be below the level of the water table. Section 730.4 of the Building Code.

c) that treated pilings be used if the pilings would extend above the ground water level. Section 738.5 of the Building Code.

8. None of the building files or the Building Department records contained the required tests. The jury knew that, in fact, no such tests had been made.

9. The jury knew that respondent Guarnieri did not require any tests despite the requirements of the Building Code, despite his knowledge of the requirements, and most importantly, despite his personal knowledge that the Bound Brook site required that these provisions of the Code be applied.

10. Respondent Guarnieri knew that unless the provisions of the Building Code were strictly applied to the Bound Brook site, the foundation for the petitioners' homes would be structurally deficient.

11. The Building Code and local practice mandated that the City Building Department make periodic inspections. The inspectors working under respondent Guarnieri failed to conduct inspections regarding footings and foundations.

12. Norman Waldron, an inspector who worked under respondent Guarnieri, made over 400 inspections at the Bound Brook site during construction. Yet, when Waldron was asked about the type of pilings used and the piling activity at Bound Brook, he repeatedly testified "I know nothing about pilings whatsoever."

13. When problems developed with certain of the houses at Bound Brook, the respondents allowed Raymond Wennik to repile the houses without the required building permits for the repiling.

14. The respondents issued Certificates of Occupancy for the petitioners' homes certifying that the houses had been constructed in substantial compliance with the Building Code when the respondents knew or should have known that the houses had not been built in accordance with the Building Code.

15. The Certificates of Occupancy represented to the petitioners and to their mortgage lenders that the houses met the requirements of the Building Code.

16. When the jury looked at all the evidence—respondent Guarnieri's knowledge that Bound Brook was a swamp—that piles were necessary—that the Building Code mandated that all manner of tests be made—that none of the tests were made—that right after respondent Guarnieri issued Certificates of Occupancy, the houses began to sink—that respondent Guarnieri had to know it—that respondent Guarnieri kept quiet and let the developer try to cover his tracks—that respondent Guarnieri did absolutely nothing until he absolutely had to, when a house collapsed in 1976—the jury could have reasonably found that respondent Guarnieri knew the facts, knew what was wrong, and intentionally concealed the problems from the petitioners.

Based on the foregoing clear, precise and unequivocal evidence, and after observing the demeanor of the witnesses, the jury reasonably found that the respondents intended to conceal from the petitioners the knowledge that their homes were not built in compliance with the Building Code and intended to conceal from the petitioners that the respondents had been negligent, had created a nuisance and had made fraudulent representations and reckless misrepresentations to the petitioners.

The Connecticut Supreme Court has restricted those occasions when a Connecticut appellate court can upset a jury verdict which has been accepted by the trial court. An appellate tribunal in Connecticut will disturb a jury verdict only when it is *clearly* against the evidence or when the verdict's manifest injustice is so plain that prejudice or corruption is apparent. *See Frankovitch v. Barton,* 185 Conn. 14, 16, 440 A.2d 254 (1981) and cases cited therein. The Connecticut Supreme Court has further mandated that the evidence must be given the most favorable construction possible in support of a jury verdict. *Id.*

The sole factual question on appellate review is whether reasonable minds *could* have concluded as did the jury. *See Tomczuk v. Alvarez,* 184 Conn. 182, 185, 439 A.2d 935 (1981).

It must be presumed that these pronouncements are not hollow statements by the Connecticut Supreme Court but are, rather, an attempt to accord fundamental rights to those seeking relief in the courts of the State of Connecticut. Yet the Connecticut Supreme Court in the matter at bar did not offer any of the reasons mentioned above for disturbing the jury's findings. Instead, the Connecticut Supreme Court chose to ignore the findings of both the jury and the trial judge as well as the extensive interrogatory responses of the jury. The Connecticut Supreme Court, as evidenced at pp. 667-670 of its opinion, recast the evidence and factual findings of the jury and simply inserted, in conclusory terms, that the evidence "cannot" support the jury's findings in this matter.

The Connecticut Supreme Court has analyzed the facts of this case *de novo* and in doing so has taken pains to rationalize the respondents' failings and to ascribe a salutary or, at least, innocent motive to each of the respondents' actions. Moreover, the Court viewed each fact individually to determine whether or not each fact, in and of itself, evidenced the respondents' intention to conceal, rather than reviewing "the cumulative effect of the facts." *Puro v. Henry, supra* at 310.

The most striking example of the Court's inexplicable desire to dilute the cumulative factual findings of the jury appears in its reported decision at 198 Conn. at 668-669. (See Appendix at 9a-10a.) The Connecticut Supreme Court therein would excuse the respondents' failure to require building permits for the repiling of houses in the Bound Brook subdivision on the grounds that repiling is a noisy, public process. The petitioners submit, however, that there is no doctrine which allows a governmental official to substitute public noise for required records. Nor did the noise, which dissipated upon the completion of the repiling, provide notice to subsequent purchasers who were out of ear shot at the time of the activity. It is this type of approach by the

Connecticut Supreme Court which is indicative of the Court's improper substitution of its own factual findings for those of the jury. The result was a new trial on appeal, a result which is in blatant conflict with the Connecticut Supreme Court's lofty pronouncements on the sanctity of a jury verdict.

While the Connecticut Supreme Court may have seen the facts differently than the jury or may have sympathized with the City of Norwalk and its former building inspector, the Court had no authority to disregard the factual findings of the jury. The Connecticut Supreme Court's reasons for interdicting in a sphere specially reserved for the jury falls woefully short of the legal standards which that court itself has formulated for the upsetting of a jury verdict. When a state's highest court infringes upon individual rights guaranteed to all persons, the only recourse is to petition this Court for review. The petitioners do so here in the hope of securing justice and rectifying a glaring error from a state court which has adversely affected the petitioners' fundamental rights.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Connecticut Supreme Court reversing the jury verdict and judgment in favor of the petitioners solely on factual determinations has denied the petitioners their right to due process as secured by the fourteenth amendment to the Constitution of the United States.

A. The Right To Trial By Jury Has Historically Been Considered A Fundamental Right In Our System Of Justice

The right to trial by jury arrived in this country with the first English colonists. *See* Simon, *The Jury System In America* at 15

(1st ed. 1975). The original Jamestown Charter guaranteed all the rights of Englishmen to the colonists including trial by jury. *See* Hyman and Torrant, "Aspects of American Trial Jury History," in *The Jury System in America* at 24-25 (1975). During the next two hundred years of development in colonial America, the right to a jury trial continued to expand and the principles embodied by a jury trial found a receptive atmosphere in the egalitarian principles of the colonists. *Id.*

In a number of significant enactments issued by a variety of legislative bodies, the right to trial by jury was consistently protected and preserved in view of its status as an inviolate right to be afforded the people. In the Declaration of Resolves of the First Continental Congress, enacted on October 14, 1774, it was unanimously provided that "the respective Colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress 28.

Similarly, in the Virginia Bill of Rights, adopted by the Virginia Convention on June 12, 1776, it was provided:

> 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

See Brown, *We Hold These Truths* at 35 (1st ed. 1941).

In the Declaration of Independence, written by Thomas Jefferson between June 10 and July 4, 1776, an important grievance cited against King George included:

For depriving us in many cases of the benefits of Trial by Jury.

See Brown, *supra* at 39.

The Declaration of the Causes and Necessity of Taking Up Arms, prepared by John Dickinson and Thomas Jefferson in July of 1775, listed as one of the bases for the colonists' revolution against Great Britain the fact that the throne had:

> * * * [deprived] us of the accustomed and inestimable privilege of trial by jury in cases affecting both life and property.

See Commager, *Documents of American History* at 93 (1st ed. 1934).

At the first session of the First Congress under the Constitution, James Madison, on June 8, 1789 while in the House of Representatives, submitted propositions to amend the United States Constitution by adding, to the clause concerning the appellate jurisdiction of the United States Supreme Court, the words, "nor shall any fact, triable by a jury, according to the course of the common law, be otherwise re-examinable than according to the principles of the common law" and, to the clause concerning trial by jury, the words: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." See Commager, *supra* at 97. These propositions were subsequently modified to the wording presently contained in the Seventh Amendment.

In *Parsons v. Bedford, et al.*, 3 Pet. 433, 7 L.Ed. 732 (1830), Justice Story, speaking for the United States Supreme Court, recognized in clear terms the fundamental nature of the right to trial by jury in civil cases:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the

> constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people.

3 Pet. at 443, 7 L.Ed. at 736. In *Jacob v. City of New York,* 315 U.S. 752, 752-53, 62 S.Ct. 854, 854, 86 L.Ed. 1166, 1168 (1942), the United States Supreme Court noted:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. *A right so fundamental and sacred to the citizen, whether guaranteed by the constitution or provided by statute, should be jealously guarded by the Courts.* (emphasis added).

The Supreme Court has further stated:

> Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603, 611 (1935) quoted with approval in *Beacon Theatres v. Westover,* 359 U.S. 500, 501, 79 S.Ct. 948, 952, 3 L.Ed.2d 988, 992 (1959).[5]

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[5]In his treatise entitled *Democracy In America* (Phillips Bradley Ed. 1948), DeToqueville, in a chapter entitled "Trial By Jury In The United States Considered As A Political Institution" wrote:

(Footnote continued on following page.)

It is evident that the right to a trial by jury, both in the civil and criminal context, has historically been considered a sacred guarantee to be preserved for the people of the United States.

B. The Connecticut Constitution Provides That The Right Of Trial By Jury Shall Remain Inviolate

Article First, Section 19 of the Constitution of the State of Connecticut provides:

> The right of trial by jury shall remain inviolate.

It is well settled in Connecticut that litigants have a constitutional right to have issues of fact determined by a jury.[6] *See Seals v. Hickey,* 186 Conn. 337, 349-52, 441 A.2d 604 (1982).

In commenting upon the respect to be accorded the findings of a jury, the Connecticut Supreme Court itself has stated:

> *The right to a jury trial is fundamental in our judicial system, and this court has said that the right is one obviously immovable limitation on the legal discretion of the court to set aside a verdict, since the constitutional right of trial by jury includes the right to have issues of fact as to which there is room or a reasonable difference*

(Footnote continued.)

> The jury system, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority.

Id. at 294.

[6]'Petitioners' common law causes of action are clearly within the protection afforded by Article First, Section 19 of the Constitution of the State of Connecticut. *Cf. Robertson v. Apuzzo,* 170 Conn. 367, 381, 365 A.2d 824 (1976).

> *of opinion among fair-minded men passed upon by the jury and not by the court. Schlag v. Paffney,* 103 Conn. 683, 685, 131 A. 420; see *Bailey v. Central Vt. Ry., Inc.,* 319 U.S. 350, 353, 63 S. Ct. 1062, 87 L.Ed. 1444, 47 Am. Jur. 2d, Jury §12. The action of the trial court is not to be disturbed unless it abused its legal discretion, and "[i]n determining this the unquestioned rule is that 'great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness.' *Dudas v. Ward Baking Co.,* 104 Conn. 516, 518, 133 A. 591; *Roma v. Thames River Specialties Co.,* 90 Conn. 18, 20, 96 A. 196." *Ardoline v. Keegan,* 140 Conn. 552, 555, 102 A.2d 352.

Camp v. Booth, 160 Conn. 10, 13, 273 A.2d 714 (1970) (emphasis added).

C. The Right To Due Process As Secured By The Fourteenth Amendment Incorporates The Right To A Trial By Jury

The Fourteenth Amendment has evolved and has been interpreted in such a manner so as to make fundamental rights applicable to the states. For example, in *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), the United States Supreme Court held that due process requires payment by a state of just compensation for private property taken for public use. The opinion of the Supreme Court was not based upon the concept that the guarantee of just compensation was a right contained in the Bill of Rights, but was instead premised on the fact that the right to be justly compensated amounted to:

> An affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by the jurists as a principle of universal law. Indeed, as a free

> government almost all other rights would become [utterly] worthless if the government possessed an uncontrollable power over the private fortune of every citizen.

166 U.S. at 236, 17 S.Ct. at 584, 8 L.Ed. at 984. The rationale of "natural equity" was further articulated by the Court in *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 92 (1908), where the Court held that fundamental rights are incorporated in the Fourteenth Amendment because they are of "such a nature that they are included in the conception of due process of law." 211 U.S. at 99, 29 S.Ct. at 20, 53 L.Ed. at 106.

The petitioners are not unmindful of the historical concern of the Supreme Court with the potential impact of an expanding due process concept.[7] However, in *Gitlow v. New York,* 268 U.S. 652, 45 S.Ct. 620, 69 L.Ed. 1138 (1925), this Court permitted the Fourteenth Amendment to incorporate fundamental rights when it announced that freedom of speech and of the

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[7]In *Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937), the Court recognized the Fourteenth Amendment as a vehicle for enforcing within the states selected portions of the Bill of Rights, but declined to uphold the petitioner's claim for protection against double jeopardy.

Subsequently, in *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947), Justice Black, in his dissenting opinion, concluded from his studies of the legislative history of the Fourteenth Amendment that the Fourteenth Amendment was designed to make the specifics of the Bill of Rights totally applicable to the states. In what has been viewed as the leading study on the legislative history of the Fourteenth Amendment as it related to incorporation of the Bill of Rights, the author concluded that the record "overwhelmingly" refuted Justice Black's thesis. Fairman, "Does the Fourteenth Amendment incorporate the Bill of Rights? The Original Understanding" 2 *Stan. L. Rev.* 5 (1949). Justice Black pointed out in *Duncan v. Louisiana,* 391 U.S. 145, 88 S. Ct. 144, 20 L.Ed.2d 491 (1960), however, that "Professor Fairman's 'History' relies very heavily on what was not said in the state legislatures that passed on the Fourteenth Amendment . . . and most importantly [did not consider the statements] by men who actually sponsored the Amendment in the Congress." 391 U.S. at 165, 88 S. Ct. at 1455-56, 20 L.Ed.2d at 505.

press were fundamental guarantees immune from state invasion:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the first amendment from abridgement by Congress—are among the fundamental, personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states.

268 U.S. at 666, 45 S.Ct. at 630, 69 L.Ed. at 1145.

Recent determinations of whether fundamental rights are applicable to the states through the due process clause of the Fourteenth Amendment have been premised upon the following criteria: (a) whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell v. Alabama,* 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158, 169 (1932); (b) whether a right is "basic in our system of jurisprudence," *In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682, 694 (1948); (c) whether a right is "a fundamental right, essential to a fair trial," *Gideon v. Wainwright,* 372 U.S. 335, 343-44, 83 S.Ct. 792, 796, 9 L.Ed.2d 799, 805 (1963); (d) whether given the system of justice as it exists in the United States, the limitation of the right in question is not necessarily fundamental to fairness in every system that might be impinged, but is fundamental in the context of processes maintained by the states, *Duncan v. Louisiana, supra,* 391 U.S. at 149-50, n. 14; 88 S.Ct. at 1447-48, n. 14, 20 L.Ed.2d at 496, n. 14; and (e) whether a right or the limitation imposed upon it satisfies the requirement of "fundamental fairness." *Lassiter v. Department of Social Services,* 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640, 648 (1981).[8]

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[8]In *Lassiter v. Department of Social Services, supra,* the Court stated:

(Footnote continued on following page.)

While a state may regulate procedures under which its laws are carried out, a state's decision in this regard is not subject to proscription under the Due Process Clause "unless it offends some principle of justice so rooted in tradition as to be ranked as fundamental." *See Aetna Life Ins. Co. v. Lavoie, supra; Patterson v. New York,* 432 U.S. 197, 201-2, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Speiser v. Randall,* 357 U.S. 513, 523, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

It is incontrovertible that the right to a trial by jury is fundamental to the American system of justice and contributes significantly to the concept of fundamental fairness. The right to trial by jury was important to our founding fathers because juries historically represented the layman's common sense, the "passional elements in our nature," and contributed to the administration of the law in accordance with the wishes, morals and values of the community. *See* Holmes, *Collected Legal Papers* at 237 (1st ed. 1920). Accordingly, in view of the historical significance of the right to trial by jury and the inclusion of "fundamental fairness" in the concept of due process, the Court should act to protect and preserve the petitioners' right to a trial by jury in the case *sub judice.*

(Footnote continued.)

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process *"is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 6 L.Ed.2d 1230, 81 S.Ct. 1743. *Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.*

452 U.S. at 24-25, 101 S.Ct. at 2158, 68 L.Ed.2d at 648 (emphasis added).

D. In State Court Actions Involving The Litigation Of Federal Rights, The Supreme Court Has Preserved The Jury's Factual Findings And Has Reversed The Actions Of Appellate Courts Which Have Attempted To Substitute Their Own Factual Findings For Those Of The Jury

In a number of instances in which actions brought pursuant to federal law have been litigated in state courts, the United States Supreme Court has not hesitated to reverse the actions of state appellate courts which have substituted their own findings of fact for those determined by a jury. The actions taken by the Court were taken in recognition of the fundamental right to trial by jury, an acknowledgment of the role that the jury should occupy as the ultimate arbiter of facts and an application of the concept of due process.

In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), the Court held that the factual findings of a state jury should be left undisturbed by a state appellate court.

A similar result, with similar language, was reached by the United States Supreme Court in *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963). The Court in its opinion emphasized the critical role occupied by the jury in our system of justice:

> *It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of*

> *witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade,* 135 U.S. 554, 571, 572; *Tiller v. Atlantic Coast Line R. Co., supra,* 68; *Bailey v. Central Vermont Ry.,* 319 U.S. 350, 353, 354.

372 U.S. 114-15, 83 S.Ct. at 664, 9 L.Ed.2d at 624 quoting from *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944) (emphasis added).

In reversing the decision of the Ohio Court of Appeals, the Court concluded:

> *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. . . . The Court of Appeals therefore erred in refusing to accept the jury's verdict.*

372 U.S. at 115, 83 S.Ct. at 664, 9 L.Ed.2d at 624-25 (emphasis added).[9]

The decisions in *Rogers v. Missouri Pacific Railroad Co., supra* and *Gallick v. Baltimore & Ohio R.R. Co., supra* make

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[9]It should be noted that the rationale of the decisions articulated by the Supreme Court in *Rogers v. Missouri Pacific Railroad Co., supra,* and *Gallick v. Baltimore & Ohio R. K. Co., supra,* have also been applied by the Supreme Court to suits in state court under the Jones Act and the Boiler Inspection Act. *See, e.g., Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 77 S. Ct. 415, 1 L.Ed.2d 404 (1957); *Harsh v. Illinois Terminal R. R. Co.*, 348 U.S. 940, 75 S. Ct. 362, 99 L.Ed. 736 (1955); *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L.Ed. 916 (1946).

clear the importance that the Supreme Court has placed on the fact finding function of the jury.[10]

E. The Court Should Promote The Confidence Of Litigants In State Courts

The petitioners are not suggesting that the Court incorporate the provisions of the Seventh Amendment in the prohibitions against the states provided by the Fourteenth Amendment. Rather, the petitioners claim that the right to a trial by jury and the right of litigants to have the jury's findings preserved on appeal is a fundamental right which is incorporated in the due process clause of the Fourteenth Amendment. *Accord., Aetna Life Ins. Co. v. Lavoie, supra.*

Nor are the petitioners asserting that they are entitled to a jury trial where none is provided. *Cf. United States Trust Co. v. Bohart,* 197 Conn. 34, 43, 495 A.2d 1034 (1985). The petitioners' right to a trial by jury in the case *sub judice* has been afforded.

Moreover, this is not a case where the petitioners are contesting a provision of a state constitution authorizing the appellate review of facts found by a jury. *Cf. Melancon v. McKeithen,* 345 F. Supp. 1025 (E.D.La. 1973) *aff'd sub nom Hill v. McKeithen,* 409 U.S. 943, 93 S. Ct. 290, 34 L. Ed. 214

[10]On a number of occasions, the United States Supreme Court has reversed the decisions of appellate courts which overturned jury verdicts on factual determinations. In the following cases the Supreme Court has granted *certiorari* and reversed the offending appellate decision without opinion: *See Gibson v. Phillips Petroleum Co.,* 352 U.S. 874, 77 S. Ct. 16, 1 L.Ed.2d 77 (1956); *Union Trust Co. v. Eastern Airlines, Inc.,* 350 U.S. 907, 76 S. Ct. 192, 100 L.Ed. 796 (1955); *Swafford v. Atlantic Coast Line R. Co.,* 350 U.S. 807, 76 S. Ct. 60, 100 L.Ed. 725 (1955); *Anderson, Admin. v. Atlantic Coast Line R. Co.,* 350 U.S. 807, 76 S. Ct. 60, 100 L.Ed. 725 (1955); *Williams v. Carolina Life Ins. Co.,* 348 U.S. 802, 75 S. Ct. 30, 99 L. Ed. 633 (1954).

(1972). The Constitution of the State of Connecticut already provides that "the right to trial by jury shall remain inviolate."

This is a case where the petitioners availed themselves of their right to a jury trial, where the jury has made factual findings in favor of the petitioners and where the appellate court has reversed the jury's verdict solely on factual determinations. Accordingly, the petitioners respectfully submit that the decision of the Connecticut Supreme Court substituting its own factual findings for the factual determinations of the jury is a denial of the petitioners' right to trial by jury, represents a denial of a fundamental right and constitutes a denial of due process.

The decision of the Connecticut Supreme Court will not only adversely affect the petitioners' rights, but will have ramifications on our judicial system. If uncorrected, the blatant disregard of a jury's findings in one of the longest civil jury trials in Connecticut history will impair the confidence of those who look to the courts of the State of Connecticut for a redress of grievances. Moreover, given a choice between the state and federal courts, Connecticut litigants will seek the federal forum to prevent their right to a trial by jury from being trampled by the Connecticut appellate courts. The docket of the federal courts is already congested and litigants should be encouraged to rely on their state courts. Such reliance will only occur when the state courts serve to protect and enforce fundamental rights.

Conclusion

A jury, selected after ten weeks of *voir dire*, who heard and observed over seventy witnesses, who examined over 200 exhibits, who viewed the petitioners' homes, who deliberated for ten days, who cogently and consistently responded to over 5,000 interrogatories, has rendered a verdict in favor of the petitioners. This jury of the petitioners' peers has performed its function and awarded the petitioners their recompense in the most exemplary tradition of our jurisprudence.

Yet, the Connecticut Supreme Court has overturned the jury's verdict and the judgment entered by the trial court based solely on a re-examination of factual findings. The Connecticut Supreme Court did not observe the demeanor of the witnesses or perform any of the other fact finding functions which were entrusted to the jury. The Connecticut Supreme Court merely concluded that the facts were different from those found by the jury.

When the petitioners commenced this civil action, they placed their trust in a judicial system where all persons stand equal before the law; where the facts of a dispute would be determined by a jury of their peers; and where the appellate courts of the State of Connecticut serve to uphold the right to a trial by jury. If the decision of the Connecticut Supreme Court is not reversed, the petitioners will be denied more than their judgment; they will be denied Justice.

The petitioners' right to due process as secured by the Fourteenth Amendment requires that the decision of the Connecticut Supreme Court be reversed. Justice dictates that the findings of the jury be upheld. This honorable Court represents the petitioners' only hope to have their right to a trial by jury protected and secured.

Respectfully submitted,

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Connecticut Supreme Court Decision.

BOUND BROOK ASSOCIATES ET AL. *v.* CITY OF NORWALK ET AL.

(12209)
(12212)

PETERS, C. J., HEALEY, SHEA, DANNEHY and SANTANIELLO, Js.

The plaintiffs sought damages from, inter alios, the named defendant city and the defendant G, the former building inspector of that city, in connection with the allegedly negligent design and construction of certain houses purchased by the plaintiffs. To avoid the special defense of the statute of limitations the plaintiffs had affirmatively pleaded that the defendants had fraudulently concealed the existence of their cause of action. On appeals by the city and by G from the judgment rendered on the verdicts returned by the jury against them, *held* that, as a matter of law, the plaintiffs failed to establish by "clear, precise, and unequivocal" evidence that the defendants had intended to conceal the existence of the cause of action; therefore, the jury could not reasonably and legally have concluded, as it did conclude, that the defendants fraudulently concealed the existence of the plaintiffs' cause of action, and the trial court erred in refusing either to direct a verdict in their favor or to render a judgment notwithstanding the verdicts.

Argued December 12, 1985—decision released February 18, 1986

Action to recover damages for, inter alia, the allegedly negligent design and construction of the plaintiffs' houses, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Landau, J.*; verdicts and judgment for the plaintiffs against all of the defendants except Louis J. Guardella, Inc., from which the defendant William R. Guarnieri and the named defendant appealed to this court. *Error; judgment directed.*

James V. Minor, deputy corporation counsel, for the appellant (named defendant).

Paul L. Blawie, with whom, on the brief, was *Karen Reynolds*, for the appellant (defendant William R. Guarnieri).

Alan R. Spirer and *Robert M. Davidson*, with whom was *Karan Spirer*, for the appellees (plaintiffs).

Philip M. Block filed a brief as amicus curiae.

PETERS, C. J. The principal issue on this appeal is whether the defendants, the city of Norwalk (hereinafter Norwalk), and William R. Guarnieri, the former chief building inspector for Norwalk, fraudulently concealed the existence of a cause of action so as to toll the running of a statute of limitations. The plaintiffs, owners and former owners of houses in the Bound Brook Estates subdivision in Norwalk, commenced a suit against the defendants[1] by complaint dated September 19, 1978. In that complaint, the plaintiffs alleged that the defendants were liable for negligence, nuisance, negligent nuisance, and fraudulent and reckless misrepresentations in connection with the construction of houses purchased by the plaintiffs. In order to avoid the defendants' special defenses that the plaintiffs' cause of action was time-barred, the plaintiffs affirmatively pleaded, pursuant to General Statutes § 52-595,[2] that the defendants had "fraudulently concealed from the plaintiffs [the] existence of their cause of action." Following a lengthy trial, the defendants unsuccessfully moved for directed verdicts in their favor. Subsequently, the jury returned verdicts for the plaintiffs against Norwalk and Guarnieri on all counts,[3]

[1] The plaintiffs are owners or former owners of fifty-nine houses in the subdivision. In this action, they joined as defendants Bound Brook Estates, Inc., the development company; Raymond Wennik, the president of Bound Brook Estates; Harry E. Bryan, the design engineer; Louis J. Gardella, Inc., the pile driver; the city of Norwalk; and William R. Guarnieri, the Norwalk building inspector. Bryan died prior to trial and his estate defaulted in this action.

[2] General Statutes § 52-595 provides: "FRAUDULENT CONCEALMENT OF CAUSE OF ACTION. If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

[3] Verdicts were also rendered against all but one of the other defendants. Bound Brook Estates, Inc., and Raymond Wennik were found liable by the jury and subsequently reached an agreement with the plaintiffs,

finding that, although the action had been brought more than three years from the acts and omissions in question, the statute of limitations had been tolled by fraudulent concealment on the part of the defendants.[4] Compensatory damages of approximately $2.3 million were awarded to the plaintiffs. Claiming that there was insufficient evidence to support the verdicts, the defendants moved the trial court to set aside the verdicts and to render judgment for the defendants notwithstanding the jury's verdicts. These motions were denied by the trial court on May 9, 1983, and the defendants have appealed. We find error.

The underlying facts are not in dispute. In 1965 and 1966, Bound Brook Estates, Inc. (hereinafter Bound Brook), received the approval of the city of Norwalk's planning commission and its common council to build a residential subdivision of 102 homes in Norwalk. Part of the land to be developed was a swamp composed of "soft, wet, marshy" soils. Bound Brook hired Harry E. Bryan, a well known professional engineer and surveyor of excellent reputation in the area, to plan the subdivision. Because of the soil conditions, Bryan determined that many of the houses would have to be built on pilings.

Subsequently, Raymond Wennik, president of Bound Brook, engineer Bryan, the defendant Guarnieri, and a deputy building inspector met to discuss the pending construction. At the time, Guarnieri had been chief building inspector of Norwalk for approximately eight

approved by the court, settling all claims against them for a total of $1.25 million. Only the defendant Louis J. Gardella, Inc., received a verdict in its favor. None of these defendants is a party to the present appeal.

[4] The plaintiffs have not challenged the jury's finding that the action was commenced more than three years from the acts and omissions in question and so would be barred by the statute of limitations absent fraudulent concealment by the defendants. In oral argument before this court, counsel for the plaintiffs conceded that the suit would be barred by the statute of limitations if fraudulent concealment were not established.

years. Although he had been involved in the residential construction business for a number of years, Guarnieri had no formal education in either engineering or architecture. Guarnieri discussed with Wennik and Bryan the building code[5] requirements for the construction of piling foundations, but indicated that neither he nor anyone on his staff had the professional engineering expertise necessary to evaluate or supervise the design and installation of the pilings.[6] Relying on provisions of the building code which permit the building inspector to accept reports and inspections by qualified experts outside the building department, Guarnieri arranged to have engineer Bryan assume responsibility for supervising the installation of the pilings and for certifying their compliance with the building code upon completion.

Following this meeting, Guarnieri issued building permits for the project, and construction began, with untreated wood pilings used to support many houses. In accordance with his regular practice, Guarnieri opened a separate file in the building department office for each house to be constructed. When completed, each file contained the building permit, with a notation on its face that the house had a wood pile foundation; the certificate of occupancy signed by Guarnieri, certifying substantial compliance with the building and zoning regulations of Norwalk; the inspection field sheet, recording periodic inspections of the house during the construction process; a plot plan; and a letter signed and sealed by engineer Bryan,[7] certifying that the pil-

[5] The city of Norwalk adopted the state building code in 1961, and this code was in effect throughout the period of construction of the subdivision.

[6] Two of the plaintiffs' expert witnesses testified that only a professional engineer or architect was capable of designing a piling system.

[7] The text of the letter of certification is as follows: "In accordance with Building Permit Applications filed in the Office of the Building Inspector, we certify to the following: The piling and the reinforced concrete foundation for house on lot ____ are in accordance with the plans filed with the

ing foundation had been constructed in accordance with both the building code and the piling plan on file in the building department. These files were open to public inspection. In mid-1969, construction on the houses ended and Guarnieri issued the final certificates of occupancy.

Shortly after construction had been completed, several houses in the Bound Brook subdivision developed serious settlement problems, necessitating the repiling of three of them by Bound Brook. Bound Brook neither applied for nor obtained building permits for this work. During the next few years, settlement problems of varying degrees developed in some additional houses, culminating in the collapse in 1976 of the ground floor of one house.

In 1977, Norwalk commissioned an engineering study of all the houses in the subdivision to determine the cause and extent of the problem and to attempt to find solutions. The study concluded that the wood pile foundations had been improperly designed, and that the use of untreated wood pilings had been inappropriate because of the fluctuating water table in the area. Following the release of this report, the plaintiffs filed the instant action.

On appeal from the judgment against them, Norwalk and Guarnieri both claim that the trial court erred in failing to direct a verdict in their favor, or to render judgment notwithstanding the verdicts, because the evidence produced at trial was insufficient to establish that they had fraudulently concealed from the plaintiffs the existence of a cause of action. Without proof of fraudulent concealment, the plaintiffs' cause of action was

Office of the Building Inspector of the City of Norwalk and are in accordance with the building code and ordinances of said City of Norwalk."

This letter was signed and sealed by Harry E. Bryan, registered professional engineer.

barred by the statute of limitations.[8] Because we find this claim of error to be well taken, we need not address the defendants' other assignments of error which challenge the trial court's rulings with regard to certain evidentiary matters, with regard to the instructions given to the jury, and with regard to sovereign immunity as a defense to Norwalk.[9]

To establish that the defendants had fraudulently concealed the existence of their cause of action and so had tolled the statute of limitations, the plaintiffs had the burden of proving that the defendants were aware of the facts necessary to establish this cause of action; *Puro* v. *Henry*, 188 Conn. 301, 311, 449 A.2d 176 (1982); and that they had intentionally concealed those facts from the plaintiffs.[10] *Zimmerer* v. *G. E. Company*, 126 F. Sup. 690, 693 (D. Conn. 1954); *Lippitt* v. *Ashley*, 89 Conn. 451, 480, 94 A. 995 (1915); see note, "Fraudulent Concealment of a Right of Action and the Statute of Limitations," 43 Harv. L. Rev. 471, 474 (1929); comment, "The Application of the Doctrine of Fraudulent Concealment to Modern Federal Trade

[8] General Statutes § 52-584 provides in relevant part: "LIMITATION OF ACTION FOR INJURY TO PERSON OR PROPERTY. No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

General Statutes § 52-577 provides: "ACTION FOUNDED UPON A TORT. No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

[9] The plaintiffs, pursuant to Practice Book § 3012 (a), challenge the trial court's instruction that reliance is a necessary element of fraudulent concealment. Because of our holding that the plaintiffs failed to prove intent to conceal, we do not address this claim.

[10] We do not decide whether affirmative acts of concealment are always necessary to satisfy General Statutes § 52-595, as the trial court instructed the jury, or whether a failure to act would be sufficient. See comment, "The Application of the Doctrine of Fraudulent Concealmen: to Modern Federal Trade Conspiracy Cases," 14 Conn. L. Rev. 115 (1981).

Conspiracy Cases," 14 Conn. L. Rev. 115, 127-28 (1981). The defendants' actions must have been "directed to the very point of obtaining the delay [in filing the action] of which [they] afterward [seek] to take advantage by pleading the statute." *Lippitt* v. *Ashley*, supra, 480; *Zimmerer* v. *G. E. Company*, supra, 693. To meet this burden, it was not sufficient for the plaintiffs to prove merely that it was more likely than not that the defendants had concealed the cause of action. Instead, the plaintiffs had to prove fraudulent concealment by the more exacting standard of " 'clear, precise, and unequivocal' " evidence; *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 150, 163, 464 A.2d 18 (1983); *Puro* v. *Henry*, supra, 308; *Alaimo* v. *Royer*, 188 Conn. 36, 39, 448 A.2d 207 (1982).

The plaintiffs claim that they sustained this burden by establishing: (1) that Guarnieri, and through him Norwalk, issued the building permits and certificates of occupancy without first obtaining test results and affidavits required by the Building Code; (2) that a deputy building inspector signed misleading field inspection reports and filed them in the building department office; (3) that Guarnieri permitted the repiling of several houses without requiring building permits; and (4) that both Guarnieri and Norwalk later failed to investigate or to warn the plaintiffs or to revoke the certificates of occupancy when they became aware that settlement problems had developed in a number of houses. The defendants, on the other hand, claim that, even if these allegations were true, they do not establish that the defendants *intended to conceal* the cause of action from the plaintiffs. Since intent to conceal is an essential element of fraudulent concealment, they maintain that the plaintiffs have not sustained their burden of proof, and that the trial court erred in denying their motions for directed verdicts and for judgment notwithstanding the jury's verdicts.

Our review of a trial court's refusal to direct a verdict or to render judgment notwithstanding the verdict takes place within carefully defined parameters. We must consider the evidence, including reasonable inferences which may be drawn therefrom, in the light most favorable to the parties who were successful at trial; *Bleich* v. *Ortiz*, 196 Conn. 498, 501, 493 A.2d 236 (1985); giving particular weight to the "concurrence of the judgments of the judge and the jury, who saw the witnesses and heard the testimony . . . ." *Chanosky* v. *City Building Supply Co.*, 152 Conn. 642, 643, 211 A.2d 141 (1965). The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached their conclusion. *Bleich* v. *Ortiz*, supra, 500–501; *Pinto* v. *Spigner*, 163 Conn. 191, 192–93, 302 A.2d 266 (1972); *Chanosky* v. *City Building Supply Co.*, supra, 643. After a thorough review of the extensive evidence presented in this case, we conclude that the plaintiffs failed as a matter of law to meet their heightened burden of proving that the defendants fraudulently concealed the existence of the cause of action. The jury's verdict, therefore, cannot stand.

Contrary to the plaintiffs' claim, the evidence that Guarnieri issued building permits and certificates of occupancy without first obtaining affidavits and test data concerning the piling foundations does not prove an intent to conceal the facts underlying the present cause of action. The evidence presented at trial established that Guarnieri's failure to require the test data was prompted by his reliance on the representations of a professional engineer that the piling foundations met the code specifications. Such reliance on outside experts is specifically authorized by the code, especially in situations such as the instant one in which the building inspector lacks the technical expertise to handle a particular project. See Connecticut Basic Building Code

(1966) §§ 108.3, 111.4, 129.11 and 129.13. There was no evidence whatsoever that Guarnieri knew when he issued the building permits and certificates of occupancy that the piling foundations as designed and constructed were deficient or that the untreated wood pilings used were inappropriate for the area, nor was there any evidence that he intended to conceal these deficiencies. His acceptance of the engineer's conclusory certification of compliance without first obtaining affidavits and detailed test data may arguably have constituted a violation of some provisions of the building code, as the plaintiffs maintain. This conduct does not, however, without more, support a reasonable finding that Guarnieri intended to conceal from the plaintiffs the deficiencies in the piling foundations in order to delay their discovery of the cause of action.

In like manner, evidence that a deputy building inspector incorrectly completed field inspection reports fails to prove an intent to conceal the cause of action. There was no evidence whatsoever that the deputy was aware of any deficiencies in the construction of the piling foundations at the time he signed the reports. On the contrary, the evidence established that he relied on the engineer's representations that the construction satisfied code specifications when he made his reports. The plaintiffs conceded in oral argument before this court that there was no evidence that the defendant Guarnieri knew that the inspection reports contained misleading statements. Without such knowledge, he could hardly have intended to conceal the rights the plaintiffs now claim to have. For similar reasons, even if the deputy's actions could be deemed attributable to Norwalk, a question we do not decide, the deputy's possible misconduct does not establish an intent to conceal on the part of Norwalk.

Similarly, the evidence that Guarnieri failed to require building permits for the repiling of several

houses by Bound Brook from 1969 to 1971[11] does not support a reasonable inference that Guarnieri thereby intended to conceal the cause of action. The repiling process was a major undertaking involving the removal of each house from its foundation, the demolition of the concrete slab upon which it had rested, the installation of new pilings with a large and noisy diesel or drop hammer, and the replacement of the houses on newly constructed foundations. In view of the intensely public nature of this process, we conclude that Guarnieri's failure to require building permits, even if arguably evidentiary of negligence in enforcing the building code, cannot reasonably be construed as evidentiary of an intent to conceal the problems with the houses and thus to delay the plaintiffs' discovery of their cause of action.

Finally, the plaintiffs failed to establish that Guarnieri's subsequent failure to warn the plaintiffs about settlement problems or to revoke certificates of occupancy after problems had developed was motivated by an intent to conceal from the plaintiffs the existence of a cause of action in order to delay their filing suit.[12] Although Guarnieri became aware sometime between 1969 and 1971 that several houses then required repiling, the record does not clearly establish that he had notice of continuing problems in the subdivision until the ground floor of one house collapsed in 1976. At that point, Guarnieri ordered an investigation and ultimately declared two houses unsafe for occupancy. In the absence of any clear evidence that he knew of the problems before that time, his failure

[11] It was established that the building code requires permits for this type of repiling, and that Bound Brook never applied for them. It is unclear from the evidence whether Guarnieri learned of the repiling before it had begun, or after it was already underway.

[12] In view of our finding that this evidence does not establish an intent to conceal, we need not decide whether Guarnieri had a duty to investigate or to warn, or whether an intentional failure to act in such circumstances would be sufficient to establish fraudulent concealment.

to act earlier could not reasonably support a finding that he intended to conceal a cause of action from the plaintiffs.[13]

In short, after reviewing all of the evidence presented, we find as a matter of law that the plaintiffs did not sustain their burden of proof, and that the jury could not reasonably and legally have concluded that the defendants had fraudulently concealed from the plaintiffs the existence of their cause of action. Consequently, the plaintiffs' action was barred by the statute of limitations, and the trial court erred in failing either to direct verdicts in favor of the defendants or to render judgment for the defendants notwithstanding the verdicts.

There is error, the judgment is set aside, and the case is remanded to the trial court with instruction to render judgment in favor of the defendants Guarnieri and Norwalk.

In this opinion the other judges concurred.

[13] The plaintiffs also claim that Norwalk is liable because other members of the building depa:tment knew of problems in the subdivision and yet did nothing to correct them. We find no clear, unequivocal evidence that anyone in the building department was informed of continuing problems in the subdivision after the repiling of several of the houses from 1969 to 1971. It is not necessary for us to decide whether, even if they were aware of the problems, Norwalk had a duty to investigate or to warn because we find no evidence whatsoever that any alleged inaction was motivated by an intent to conceal from the plaintiffs the existence of the cause of action.

Instead, the only evidence on the issue indicated that, when Norwalk became aware of the seriousness of the problem in 1976, it held public hearings, authorized an engineering study which led to the filing of the instant action, and cooperated fully with the plaintiffs in their efforts to find solutions.

Order of Connecticut Supreme Court Denying Plaintiff's Motion for Reargument.

SUPREME COURT,

STATE OF CONNECTICUT.

March 4, 1986

No. 12212

BOUND BROOK ASSOCIATES, *et al.*

v.

CITY OF NORWALK, *et al.*

The motion of the plaintiffs filed February 27, 1986 to reargue, having been presented to the Court, it is hereby

ORDERED Denied.

By the Court,

CAROLYN G. CUNKE
Assistant Clerk—Appellate

Notice Sent: 3-4-86
Blawie, Belinkie & Varone
McNamara, Clancy & Kenney
Norwalk Corporation Counsel
Davidson, Driscoll & Naylor
Goldstein & Peck
Philip M. Block
Clerk, Stamford/Norwalk
(CV78-0037139)
Hon. Sidney Landau
Reporter of Judicial Decisions

Picture of the Shaw House, 46 Marlin Drive, Norwalk, Connecticut.

Picture of the Troy House, 53 Marlin Drive, Norwalk, Connecticut.

Instructive Interrogatories Submitted to Jury.

The following is representative of the interrogatories returned by the jury for each of the Plaintiffs in this appeal:

D.N. CV 78 0037139 S	: SUPERIOR COURT
BOUND BROOK ASSOCIATION, ET AL	: J.D. OF STAMFORD/ NORWALK
vs.	: AT STAMFORD
CITY OF NORWALK, ET AL	

INSTRUCTIVE INTERROGATORIES

GENERAL INSTRUCTIONS: These interrogatories should be completed before you reach a general verdict. The foreperson should complete the answers in ink. Of course, just as the jurors must be unanimous in reaching their verdict, so must they also be unanimous in their answers to the interrogatories. Please note that each of the interrogatories must be answered "yes" or "no".

AS TO THE PLAINTIFFS _____

As to the Defendant, City of Norwalk:

FIRST COUNT

1. Did the Plaintiffs prove that the Defendant, City of Norwalk was negligent in that:

a) Through its Planning Commission and Common Council it approved the Bound Brook Estates subdivision as being suitable for the construction of houses when it knew or should have known that the lots were not suitable for the construction of houses?

Yes —— No X

b) Through its Building Department, it issued a building permit for the Plaintiffs' house when it knew or should have known that the construction plans and

specifications submitted for building permits were not suitable for the construction of a house in compliance with the State of Connecticut Basic Building Code?

Yes X No ——

c) Through its Building Department, it issued a certificate of occupancy for the plaintiffs' house when it knew or should have known that the house was not constructed in compliance with the State of Connecticut Basic Building Code?

Yes X No ——

(If the answer to questions 1(a), 1(b) and 1(c) are *all* NO, you must return a verdict in favor of the defendant, City of Norwalk on the First Count and the Second Count; then please answer question 17; if the answer to one or more of questions 1(a), 1(b) or 1(c) is Yes, please answer question 2.)

2. Did the plaintiffs prove that the act or acts of negligence found in the answers to questions 1(a), 1(b) or 1(c) were a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the First Count and the Second Count; then please answer question 17; If the answer is Yes, please answer questions 3 through 5.)

3. Do you find that the negligent acts of the Planning Commission were discretionary or ministerial?

Discretionary	Yes ——	No ——
(no response)		
Ministerial	Yes ——	No ——

4. Do you find that the negligent acts of the Common Council were discretionary or ministerial?

Discretionary	Yes ——	No ——
(no response)		
Ministerial	Yes ——	No ——

5. Do you find that the negligent acts of the Building Department were discretionary or ministerial?

Discretionary	Yes ——	No X
Ministerial	Yes X	No ——

(If you find that all of the above acts of the defendant, City of Norwalk were discretionary, you must find in favor of the defendant, City of Norwalk on the First Count and then go to Question 9; if you find that any of the above acts of the defendant, City of Norwalk were ministerial, please answer the next question.

6. Did the defendant, City of Norwalk prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 8.)

7. Did the defendant, City of Norwalk prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the First Count, then go to question 9.)

8. Did the Plaintiffs prove that the Defendant, City of Norwalk fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, City of Norwalk on the First Count; If the answer to this question is Yes, then you must find the issues in favor of the plaintiffs on the First Count and go onto question No. 9.)

Second Count

9. Did the plaintiffs prove that the defendant, City of Norwalk, by its positive act or acts as found in response to question 1(a), 1(b) or 1(c) created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk, on the Second Count, then please go to question 7; if the answer to this question is Yes, please answer question 10).

10. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the Second Count; then please go to question 17; if the answer to this question is Yes, please answer question 14).

(Interrogatories 11-13 omitted by the Court.)

14. Did the defendant, City of Norwalk prove that the plaintiffs failed to bring suit within two years from the

date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question No. 16.)

15. Did the defendant, City of Norwalk prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Second Count, then go to question 17.)

16. Did the Plaintiffs prove that the defendant, City of Norwalk fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, City of Norwalk on the Second Count; if the answer to this question is Yes, then you must find the issues for the plaintiffs on the Second Count and go onto question 17.)

Third Count

17. Did the plaintiffs prove that the defendant, City of Norwalk, by its act or acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the Third Count, then go to Question 21; if the answer to this question is Yes, please answer question 18).

18. Did the Plaintiffs prove that the nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the Third Count and then go to question 21. If the answer to this question is Yes, please answer the next question.)

19. Did the defendant, City of Norwalk prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to constitute a nuisance?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Third Count, then go to question 21.)

20. Did the Plaintiffs prove that the Defendant, City of Norwalk fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, City of Norwalk on the Third Count; if the answer to this question is Yes, then you must find the issues for the plaintiffs on the Third Count and go onto Question 21.)

FOURTH COUNT

21. Did the plaintiffs prove that the defendant, City of Norwalk, made fraudulent representations and reckless misrepresentations to the plaintiffs as alleged in paragraph 24 of the Fourth Count of the Complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the Fourth Count, then go to question 25; if the answer to this question is Yes, please answer question 22.)

22. Did the plaintiffs prove that the above fraudulent representations and reckless misrepresentations were relied upon by them and induced them to purchase their house?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk, on the Fourth Count, then go to question 25; if the answer to this question is Yes, please answer question 23.)

23. Did the defendant, City of Norwalk prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Fourth Count, then go to question 25.)

24. Did the Plaintiffs prove that the Defendant, City of Norwalk fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, City of Norwalk on the Fourth Count; if the answer to this question is yes, then you must find the issues in favor of the plaintiffs on the Fourth Count and go onto Question 25.)

AS TO THE DEFENDANT WILLIAM R. GUARNIERI:

FIFTH COUNT

25. Did the Plaintiffs prove that the Defendant, William R. Guarnieri was negligent in that:

a) he issued a building permit for the Plaintiffs' house when he knew or should have known that the proposed construction plans and specifications submitted for the building permit were not suitable for the construction of a house in compliance with the State of Connecticut Basic Building Code.

Yes X No ——

b) he failed to make adequate inspections of the Plaintiffs' house during construction?

Yes X No ——

c) he issued a certificate of occupancy for the Plaintiffs' house when he knew or should have known that the house did not comply with the provisions of the State of Connecticut Basic Building Code?

Yes X No ——

(If the answer to questions 25(a), 25(b) and 25(c) are all No, please go to question 39 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Fifth Count and the Sixth Count; if the answer to one or more of the questions 25(a), 25(b) or 25(c) is Yes, please answer question 26.)

26. Did the plaintiffs prove that the act or acts of negligence found in questions 25(a), 25(b) and 25(c) were a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 39 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Fifth Count and the Sixth Count; if the answer is Yes, please answer questions 27-29).

27. Do you find that the act of the defendant, William R. Guarnieri in issuing a building permit for the plaintiffs' house was discretionary or ministerial?

Discretionary	Yes ——	No X
Ministerial	Yes X	No ——

28. Do you find that the act of the defendant, William R. Guarnieri in failing to make adequate inspections of the plaintiffs' house during construction was discretionary or ministerial?

Discretionary	Yes X	No ——
Ministerial	Yes ——	No X

29. Do you find that the act of the defendant, William R. Guarnieri in issuing a certificate of occupancy for the plaintiffs' house was discretionary or ministerial?

Discretionary	Yes ——	No X
Ministerial	Yes X	No ——

(If you find that all of the above acts of the defendant, William R. Guarnieri were discretionary, you must find in favor of the defendant, William R. Guarnieri on the Fifth Count and then go to question 33; if you find that *any* of the above acts of the defendant, William R. Guarnieri were ministerial, please answer the next question).

30. Did the defendant, William R. Guarnieri prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 32).

31. Did the defendant, William R. Guarnieri prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question: if the answer is No, then you must find the issues in favor of the plaintiffs on the Fifth Count, then go to question 33).

32. Did the Plaintiffs prove that the Defendant, William R. Guarnieri fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for William R. Guarnieri on the Fifth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Fifth Count and go on to question 33.)

SIXTH COUNT

33. Did the plaintiffs prove that the defendant, William R. Guarnieri by his positive act or acts as found in response to questions 25(a), 25(b) or 25(c) created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 39, and you must return a verdict in favor of the defendant, William R. Guarnieri on the Sixth Count; if the answer to the question is Yes, please answer question 34).

34. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the injuries to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 39 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Sixth Count, if the answer to this question is Yes, please answer question 36).

36. Did the defendant, William R. Guarnieri prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 38).

37. Did the defendant, William R. Guarnieri prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Sixth Count, then go to question 39).

38. Did the Plaintiffs prove that the Defendant, William R. Guarnieri fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, William R. Guarnieri on the Sixth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Sixth Count and go onto question 39.)

SEVENTH COUNT

39. Did the plaintiffs prove that the defendant, William R. Guarnieri by his acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 43 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Seventh Count; if the answer to this question is Yes, please answer question 40).

40. Did the plaintiffs prove that the nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 43 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Seventh Count; if the answer to this question is Yes, please answer question 41).

41. Did the defendant, William R. Guarnieri prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to constitute a nuisance?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Seventh Count, then go to question 43).

42. Did the Plaintiffs prove that the Defendant, William R. Guarnieri fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, William R. Guarnieri on the Seventh Count; if the answer to this question is Yes, then you must find the issues for the Plaintiffs on the Seventh Count and go onto question 43).

EIGHTH COUNT

43. Did the plaintiffs prove that the defendant, William R. Guarnieri made fraudulent representations and reckless misrepresentations as alleged in paragraph 24 of the Eighth Count?

Yes X No ——

(If the answer to this question is No, please go to question 47 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Eighth Count; if the answer to this question is Yes, please answer question 44).

44. Did the Plaintiffs prove that the above fraudulent representations and reckless misrepresentations were relied upon by them and induced them to purchase their house?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, William R. Guarnieri on the Eighth Count; then go to question 47. If the answer to this question is Yes, please answer question 45).

45. Did the defendant, William R. Guarnieri prove that the Plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the Plaintiffs on the Eighth Count, then go to Question 47).

46. Did the Plaintiffs prove that the Defendant, William R. Guarnieri fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the Defendant, William R. Guarnieri on the Eighth Count; if the answer to this question is Yes, then you must find the issues for the Plaintiffs on the Eighth Count and then go onto question 47).

AS TO DEFENDANT, RAYMOND WENNIK:

NINTH COUNT:

47. Did the Plaintiffs prove that the defendant, Raymond Wennik was negligent in that:

a) He caused the tract of land known as Bound Brook Estates to be subdivided when he knew or should have known that the land was unsuitable for the construction of the plaintiffs' house?

Yes —— No X

b) He designed and constructed the plaintiffs' house in a manner that was not in compliance with the State of Connecticut Basic Building Code?

Yes X No ——

c) The pilings which were used to support the plaintiffs' house were sub-standard and unsuitable in that untreated pilings were used in a situation where they would extend above the water table and where treated pilings should have been used?

Yes X No ——

d) He used pilings which were too short?

Yes X No ——

e) The pilings were not driven to a sufficient depth?

Yes X No ——

(If the answer to Question 47(a) 47(b), 47(c), 47(d), 47(e), are *all* NO, please go to Question 57, and you must return a verdict in favor of Raymond Wennik on the Ninth and Tenth Counts; if the answer to one or more of questions 47(a), 47(b), 47(c) 47(d), 47(e), are Yes, please answer question 48).

48. Did the plaintiffs prove that the act or acts of negligence found in question 47(a), 47(b), 47(c), 47(d), 47(e) were a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 57 and you must return a verdict in favor of the defendant, Raymond Wennik on the Ninth Count; if the answer is Yes, please answer Question 49).

49. Did the defendant, Raymond Wennik prove that the Plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 51).

50. Did the Defendant, Raymond Wennik, prove that the Plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the Plaintiffs on the Ninth Count, then go to question 52).

51. Did the Plaintiffs prove that the Defendant, Raymond Wennik fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Raymond Wennik on the Ninth Count; if the answer to this question is Yes, then you must find the issues for the Plaintiffs on the Ninth Count and go onto question 52).

TENTH COUNT

52. Did the Plaintiffs prove that the defendant, Raymond Wennik by his act or acts as found in response to questions 47(a), 47(b), 47(c), 47(d), 47(e) created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 57 and you must return a verdict in favor of the defendant, Raymond Wennik on the Tenth Count; if the answer to the question is Yes, please answer question 53).

53. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 57 and you must return a verdict in favor of the defendant, Raymond Wennik on the Tenth Count; if the answer is Yes, please answer question 54).

54. Did the defendant, Raymond Wennik prove that the Plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 56).

55. Did the defendant, Raymond Wennik prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Tenth Count, then go to question 57).

56. Did the Plaintiffs prove that the Defendant, Raymond Wennik fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Raymond Wennik on the Tenth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Tenth Count, and go onto question 57).

ELEVENTH COUNT

57. Did the Plaintiffs prove that the defendant, Raymond Wennik by his act or acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 61 and you must return a verdict in favor of the defendant, Raymond Wennik on the Eleventh Count; if the answer to this question is Yes, please answer question 58).

58. Did the Plaintiffs prove that the nuisance was a proximate cause of the damages to the Plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 61 and you must return a verdict in favor of the defendant, Raymond Wennik on the Eleventh Count; if the answer to this question is Yes, please answer question 59).

59. Did the defendant, Raymond Wennik prove that the Plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the Plaintiffs on the Eleventh Count, then go to question 61).

60. Did the Plaintiffs prove that the Defendant, Raymond Wennik fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Raymond Wennik on the Eleventh Count; if the answer to this question is yes, then you will find the issues for the Plaintiffs on the Eleventh Count and go onto question 61.)

TWELFTH COUNT

61. Did the plaintiffs prove that the defendant, Raymond Wennik made fraudulent representations and reckless misrepresentations as alleged in Paragraph 24 of the Twelfth Count?

Yes X No ——

(If the answer to this question is No, please go to question 66 and you must return a verdict in favor of the defendant, Raymond Wennik on the Twelfth Count; if the answer to this question is Yes, please answer question 62).

62. Did the Plaintiffs prove that the above fraudulent representations and reckless misrepresentations were relied upon by them and induced them to purchase their house?

Yes X No ——

(If the answer to this question is No, please go to question 66 and you must return a verdict in favor of the defendant, Raymond Wennik on the Twelfth Count; if the answer to this question is Yes, please answer question 63).

63. Did the defendant, Raymond Wennik prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Twelfth Count, then go to question 65).

64. Did the Plaintiffs prove that the Defendant, Raymond Wennik fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict in favor of the defendant, Raymond Wennik on the Twelfth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Twelfth Count and go onto the next question).

65. Did the plaintiffs prove that the defendant, Raymond Wennik acted wantonly?

Yes X No ——

(NOTE: The Thirteenth Count has been withdrawn).

AS TO THE DEFENDANT BOUND BROOK ESTATES, INC.:

COUNT FOURTEEN

66. Did the plaintiffs prove that the defendant, Bound Brook Estates, Inc., was negligent in that:

a. it caused the tract of land known as Bound Brook Estates to be subdivided when it knew or should have

known that the land was unsuitable for the construction of the plaintiffs' house?

Yes —— No X

b. it designed and constructed the plaintiffs' house in a manner that was not in compliance with the State of Connecticut Basic Building Code?

Yes X No ——

c. The pilings which were used to support the plaintiffs' house were substandard and unsuitable in that untreated pilings were used in a situation where such pilings would extend above the ground water table and where treated pilings should have been used?

Yes X No ——

d. it used pilings which were too short?

Yes X No ——

e. the pilings were not driven to a sufficient depth?

Yes X No ——

(If the answer to questions 66(a), 66(b), 66(c), 66(d), 66(e) are all No, please go to question 76 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Fourteenth Count and the Fifteenth Count, if the answer to one or more of the question 66(a), 66(b), 66(c), 66(d), 66(e) is Yes, please answer question 67).

67. Did the plaintiffs prove that the act or acts of negligence found in questions 66(a), 66(b), 66(c), 66(d), 66(e), were a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 76 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Fourteenth Count and the Fifteenth Count; if the answer is Yes, please answer question 68).

68. Did the Defendant, Bound Brook Estates, Inc., prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 70).

69. Did the defendant, Bound Brook Estates, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Fourteenth Count, then go to question 71).

70. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Bound Brook Estates, Inc., on the Fourteenth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Fourteenth Count and go onto question 71.)

FIFTEENTH COUNT

71. Did the plaintiffs prove that the defendant, Bound Brook Estates, Inc., by its act or acts as found in response to Question 66(a), 66(b), 66(c), 66(d), 66(e) created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 76 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc. on the Fifteenth Count; if the answer to the question is Yes, please answer Question 72).

72. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 76 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Fifteenth Count; if Yes, please answer question 73).

73. Did the defendant, Bound Brook Estates, Inc., prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 75).

74. Did the defendant, Bound Brook Estates, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Fifteenth Count, then go to Question 76).

75. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Bound Brook Estates, Inc., on the Fifteenth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Fifteenth Count and go onto Question 76).

SIXTEENTH COUNT

76. Did the Plaintiffs prove that the defendant, Bound Brook Estates, Inc., by its act or acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the Defendant, Bound Brook Estates, Inc., on the Sixteenth Count; if Yes, please answer question 77).

77. Did the plaintiffs prove that the nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 80 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Sixteenth Count;

if the answer to this question is Yes, please answer question 78).

78. Did the Defendant, Bound Brook Estates, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act or omission which you found to constitute a nuisance?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer to this question is No, then you must find the issues in favor of the plaintiffs on the Sixteenth Count, then go to question 80).

79. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the Defendant, Bound Brook Estates, Inc., on the Sixteenth Count; if the answer to this question is Yes, then you will find the issues for the Plaintiffs on the Sixteenth Count and go onto Question 80).

SEVENTEENTH COUNT

80. Did the Plaintiffs prove that the defendant, Bound Brook Estates, Inc. made fraudulent representations and reckless misrepresentations as alleged in paragraph 24 of the Seventeenth Count?

Yes X No ——

(If the answer to this question is No, please go to question 85 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Seventeenth Count; if the answer to this question is Yes, please answer question 81).

81. Did the Plaintiffs prove that the above fraudulent representations and reckless misrepresentations were relied upon by them and induced them to purchase their house?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the SEVENTEENTH Count; if the answer to this question is Yes, please answer Question 82).

82. Did the defendant, Bound Brook Estates, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the Plaintiffs on the Seventeenth Count, then go to question 84).

83. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Seventeenth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Seventeenth Count and go onto Question 84).

84. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., acted wantonly?

Yes X No ——

(Note: The EIGHTEENTH COUNT has been withdrawn).

AS TO THE DEFENDANT, LOUIS J. GARDELLA, INC.

85. Did the Plaintiffs prove that the defendant, Louis J. Gardella, Inc., was negligent, in that:

a) It drove the pilings for the plaintiffs' house improperly?

Yes X No ——

b) It drove untreated pilings when it knew or should have known that such pilings would not be suitable for the support of the plaintiffs' house?

Yes —— No X

c) It drove pilings of insufficient length to support the plaintiffs' house?

Yes X No ——

d) It drove pilings of insufficient size and dimension to support the plaintiffs' house?

Yes —— No X

(If the answer to questions 85(a), 85(b), 85(c), 85(d) are all No, please go to question 95, and you must return a verdict in favor of the defendant, Louis J. Gardella, Inc., on the Twenty-Third Count and the Twenty-Fourth Count; if the answer to one or more of questions 85(a), 85(b), 85(c) or 85(d) is Yes, please answer question 86).

86. Did the plaintiffs prove that the act or acts of negligence found in question 85(a), 85(b), 85(c), 85(d) were a proximate cause of the damages to the Plaintiffs' property claimed in the Complaint?

Yes X No ——

(If the answer to this question is No, please go to Question 95 and you must return a verdict in favor of the defendant, Louis J. Gardella on the Twenty-Third Count; if the answer is Yes, please answer question 87).

87. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 89).

88. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Twenty-Third Count, then go to question 90).

89. Did the Plaintiffs prove that the Defendant, Louis J. Gardella, Inc., fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes —— No X

(If the answer to this question is No, then you must return a verdict for the defendant, Louis J. Gardella, Inc., on the Twenty-Third Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Twenty-Third Count and go onto question 90).

TWENTY-FOURTH COUNT

90. Did the plaintiffs prove that the defendant, Louis J. Gardella, Inc., by its act or acts as found in response to questions 85(a), 85(b), 85(c) or 85(d), created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, please go to Question 95 and you must return a verdict in favor of the defendant, Louis J. Gardella, Inc., on the Twenty-Fourth Count; if the answer to this question is Yes, please answer Question 91).

91. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 95 and you must return a verdict in favor of the defendant, Louis J. Gardella, Inc., on the Twenty-Fourth Count; if Yes, please answer question 92).

92. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 94).

93. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Twenty-Fourth Count, then go to question 95).

94. Did the Plaintiffs prove that the Defendant, Louis J. Gardella, Inc., fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes —— No X

(If the answer to this question is No, then you must return a verdict for the defendant, Louis J. Gardella, Inc., on the Twenty-Fourth Count; if the answer to this question is Yes, then you must find the issues for the plaintiffs on the Twenty-Fourth Count then go onto Question 95).

TWENTY-FIFTH COUNT

95. Did the plaintiffs prove that the defendant, Louis J. Gardella, Inc., by its acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the Defendant, Louis J. Gardella, Inc., on the TWENTY-FIFTH COUNT; if Yes, please answer Question 96).

96. Did the plaintiffs prove that the nuisance was a proximate cause of the damages to the Plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, Louis J. Gardella, Inc., on the TWENTY-FIFTH COUNT; if Yes, please answer Question 97).

97. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to constitute a nuisance?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Twenty-Fifth Count).

98. Did the Plaintiffs prove that the Defendant, Louis J. Gardella, Inc., fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes —— No X

(If the answer to this question is No, then you must return a verdict for the defendant, Louis J. Gardella, Inc., on the Twenty-Fifth Count; if the answer is Yes, then you will find the issues for the Plaintiffs on the TWENTY-FIFTH COUNT).

_____

Foreperson

Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1933

In The
Supreme Court of the United States
October Term, 1985

BOUND BROOK ASSOCIATION, et al.,
Petitioners,

vs.

CITY OF NORWALK, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT:

A. THIS PETITION SHOULD BE DENIED SINCE PETITIONERS HAVE FAILED TO RAISE ANY CONSTITUTIONAL ISSUE CONCERNING REVIEW OF A STATE APPELLATE COURT'S INTERPRETATION OF A STATE STATUTE THAT DEFINES FRAUDULENT CONCEALMENT 3

B. THIS PETITION SHOULD BE DENIED SINCE THE CONNECTICUT SUPREME COURT CORRECTLY DETERMINED THAT THERE WAS NO EVIDENCE TO SUPPORT A JURY VERDICT THAT THE STATUTES OF LIMITATIONS WERE TOLLED BY FRAUDULENT CONCEALMENT 7

C. THIS PETITION SHOULD BE DENIED SINCE EVEN IF THIS COURT, FOR THE FIRST TIME, REVERSED A STATE APPELLATE COURT'S DECISION ON A STATE STATUTE AS TO WHETHER JUDGMENT *N.O.V.* WAS PROPERLY GRANTED, THE CASE MUST STILL BE REMANDED TO THE CONNECTICUT SUPREME COURT TO DETERMINE LEGAL ISSUES SUCH AS LIABILITY OF A MUNICIPALITY FOR NEGLIGENT ISSUANCE OF A CERTIFICATE OF OCCUPANCY 8

CONCLUSION 10

TABLE OF CONTENTS TO APPENDICES

Page

Decisions of Connecticut Supreme Court affirming or directing grant of motion for judgment *n.o.v.* ..... A1 to A10

List of statutes or decisions of 50 states rejecting liability for damages for negligent inspection or issuance of a certificate of occupancy ..... B1 to B38

TABLE OF AUTHORITIES

Page

CASES

Bound Brook Association vs. Norwalk, 198 Conn. 660 6

Boyers vs. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443 4

Schulz vs. Pennsylvania R. Co., 350 U.S. 523, 76 S. Ct. 708 4

Sestito vs. Groton, 178 Conn. 520, 423 A. 2d 165 1

Shore vs. Stonington, 187 Conn. 147, 444 A. 2d 1379 1

Neely vs. Martin K. Eby Construction Co., 386 U.S. 317, 87 S. Ct. 1072 ..... 5, 6

Simblest vs. Maynard, 427 F. 2d (2d Cir. 1970) 6

STATUTES

Section 52-595, Connecticut General Statutes 4

Connecticut Public Act 86-338 8

TREATISES

9 *Federal Practice and Procedure*, Wright and Miller 4

The Business of the Supreme Court, Frankfurter and Landis 4

I. COUNTERSTATEMENT OF THE CASE

Contrary to plaintiffs' argument in their Petition for Certiorari, the Connecticut Supreme Court emphasized those facts favorable to the plaintiffs in its decision released February 18, 1986. Chief Justice Ellen Peters, the author of the opinion, is known for her opinions expanding constitutional rights and seeking to expand municipal liability. *Sestito vs. Groton,* 178 Conn. 520 (1979); *Shore vs. Stonington,* 187 Conn. 147 (Peters, J. dissenting at Pages 157-163) (1982).

The undisputed facts not emphasized in plaintiffs' petition show that the City of Norwalk issued the last certificate of occupancy in mid-1969, and suit was not brought by plaintiffs until over nine years later, in September 1978. The jury found that all applicable statutes of limitations expired against the City of Norwalk and its Chief Building Inspector, William Guarnieri. Two homeowners sued the developer but not the City or Chief Building Inspector in 1973, and their cases were consolidated and tried with this case. By 1974, the following evidence indicated that the plaintiffs knew or should have known of settlement problems:

1. Prior to 1971, the developer offered to repurchase, repurchased, releveled or repiled seven houses.

2. Two neighbors had sued the developer, his engineer, and the developer's company because of settlement problems.

3. The owners of twenty homes (more than 75 percent of those plaintiffs who owned a house prior to December, 1974) testified of personal problems or personal

knowledge of neighborhood problems with house and yard settlement. One homeowner testified that neighbors discussed formation of an association to deal with settlement problems before 1973.

4. Even though the Building Inspector's records were open to the public, and each file for each house on piles had a certification from the engineer that a wood pile foundation had been constructed in accordance with the building code, not one plaintiff ever examined the file, went to the Building Inspector's office, talked by phone or in person to any city official, was misled by any action or assertion by any city official, or ever *relied* on any act or statement of any city official, before or after purchase of a house. Not one plaintiff testified that a city official misled him or her, or failed to cooperate when asked.

Finally, when City officials were asked, a committee of the City's local legislative body conducted an investigation into the reasons why a partial foundation failure occurred in 1976. The City paid $13,000.00 for an engineering study in 1977 and $4,000.00 for a later study on repiling methods. The mayor and other City officials went to Washington, D.C. to obtain federal aid, and wrote many state and federal officials seeking to help the plaintiffs.

Plaintiffs, through their attorneys, *admitted* at trial there was no evidence of detrimental reliance by any plaintiff on any act by a City official at oral argument. Plaintiffs' counsel *admitted* at oral argument before the Connecticut Supreme Court that there was no evidence that the Building Inspector knew that the engineer's certifications as to piling were misleading. (Page 9a of Petitioners' Brief)

All witnesses, including the Plaintiffs' experts, testified that *only* an engineer could certify that the wood

pile foundation would comply with the building code, and that the building code allowed a Building Inspector to rely upon such certificates of an outside engineer. No one in the Building Inspector's office was qualified to plan or implement such a wood pile foundation.

The appeal to the Connecticut Supreme Court involved only the City of Norwalk and its Chief Building Inspector, since the developer and his corporation paid $1.25 million in a court-approved settlement. Never reached by the Connecticut Supreme Court were the legal issues of liability, never decided in Connecticut but overwhelmingly decided in most of the states, that a municipal inspector cannot be liable in damages for negligent issuance of a certificate of occupancy.

The issue of deprivation of the right to a jury trial was never raised below, in the trial court or before the Connecticut Supreme Court (except in a cursory fashion in a motion to reargue).

II. ISSUES

A. The Supreme Court should deny the Petition for Writ of Certiorari, since it lacks jurisdiction conferred upon this court by 28 U.S.C. Section 1257(3), and since there is no federal issue involved.

The Petitioners do not cite one single case supporting their argument that the U. S. Supreme Court should "second guess" a decision of a State Appellate Court on a *purely state issue.* All of the cases cited in Petitioners' brief deal with a federal statute, such as the FELA, Jones Act, or Boiler Inspection Act. These line of cases, dealing with a state court interpretation of a federal statute, have

been criticized by various commentators such as Wright and Miller, 9 *Federal Practice and Procedure,* Section 2526, Pages 554-9, and in Justice Frankfurter's dissents: *Schulz vs. Pennsylvania R. Co.,* 350 U.S. 523 at 527, 76 S. Ct. 708 at 711, 100 L. Ed. 668; *Boyers vs. Missouri Pacific R. Co.,* 352 U.S. 500, at 524, 77 S. Ct. 443 at 465, 1 L. Ed. 2d 520; Frankfurter and Landis, *The Business of the Supreme Court,* 206 *et seq.*

The decision of the Connecticut Supreme Court dealt solely with a Connecticut statute, which codifies the common law as to when a statute of limitations is tolled by fraudulent concealment:

Section 52-595. *Fraudulent Concealment of Cause of Action*

> If any person, liable to an action by another, fraudulently *conceals from him* the existence of the cause of such action, such cause of action shall be deemed to accure against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence. (emphasis added)

The City and Chief Building Inspector argued that none of the necessary elements of this statute were met by the homeowners, since they were not ignorant of their cause of action, there was no evidence that the City committed an affirmative act of concealment, intending to keep any homeowner in ignorance of a cause of action, and there was no evidence that any plaintiff relied, to his detriment, upon any affirmative act of concealment by the City. The Connecticut Supreme Court decided the plaintiffs failed to meet their heightened burden of proof, to show by *clear and convincing evidence* that either the City or its Chief

Building Official fraudulently concealed from each plaintiff the existence of the cause of action.

The facts as cited in this brief, and even in the Petitioners' brief, clearly indicate that there was no communication by any plaintiff with any City official; further, all records were available in open City files, and were subject to review by any plaintiff prior to or after the purchase of his home. The Petitioners sought to avoid their basic failure of proof by arguing before the Connecticut Supreme Court a theory of "constructive reliance", or "constructive fraudulent concealment". The Connecticut Supreme Court flatly rejected this attempt, and determined from the facts and all reasonable inferences from the facts that the plaintiffs failed to meet their heightened burden of proof.

Even if the Connecticut Supreme Court had construed a federal statute, there is no deprivation of a due process right to a jury trial when a trial court or an appellate court determines, as a matter of law, that there is insufficient evidence upon which to base a jury verdict. *Neely vs. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072 (1967).

In *Neely*, the U. S. Supreme Court stated that Rule 50 of the Federal Rules of Civil Procedure did not restrict the Seventh Amendment's guarantee of jury trial, by allowing a trial court or appellate court to enter judgment *n. o. v.;*

> As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n. o. v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n. o. v.* (citation omitted) (87 S. Ct. at 1076)

In Connecticut, the standard for granting a directed verdict or judgment *n. o. v.* is similar to the standard articulated by the Second Circuit, in determining whether there is sufficient evidence to go to a jury:

> Simply stated, it is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as the verdict that reasonable men could have reached. *(Simblest vs. Maynard,* 427 F. 2d 1, 4 (2d Cir. 1970))

In Connecticut, the test was set forth in *Bound Brook Association vs. Norwalk,* 198 Conn. 660, at 667 (page 8a of the *Petition for Writ of Certiorari*):

> Our review of a trial court's refusal to direct a verdict or to render judgment notwithstanding the verdict takes place within carefully defined parameters. We must consider the evidence, including reasonable inferences which may be drawn therefrom, in the light most favorable to the parties who are successful at trial . . . The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached their conclusion . . .

In Appendix A are Connecticut Supreme Court cases which review the decision of a trial court to grant or deny a motion for judgment *n. o. v.* These forty-one cases indicate that for the past century Connecticut trial courts and the Connecticut Supreme Court have set aside jury verdicts for insufficient evidence.

Therefore, Petitioners' attempt to create a "federal issue" must fail for three reasons. First, this court has ruled in *Neely, supra,* that there is no constitutional violation if a trial or appellate court grants judgment *n. o. v.* Second, the U. S. Supreme Court has never reviewed a de-

cision of a state court construing a state statute as to whether judgment *n. o. v.* was properly granted. Finally, this allegedly constitutional issue was never raised before, except in a cursory motion to re-argue, which was denied by the Connecticut Supreme Court.

B. The Connecticut Supreme Court acted properly in finding, as a matter of law, that there was insufficient evidence to support a jury verdict on the issue of fraudulent concealment.

The Connecticut Supreme Court decided that there was insufficient evidence to support a jury verdict that the City of Norwalk, or its Chief Building Official, intentionally concealed a cause of action from any of the plaintiffs.

From a review of the facts as cited in this brief, the Petitioners' brief, and the Connecticut Supreme Court decision, it is obvious that the plaintiffs were not ignorant of the existence of a cause of action, since four people, the owners of two different houses, sued the developer, the developer's corporation, and the engineer in 1973, five years before the Bound Brook Association filed suit. There was no detrimental reliance on any affirmative act of the City or a City employee in concealing a cause of action from plaintiff since there was simply no communication between any of the homeowners and the City. Furthermore, all of the pertinent records were open to the public in the Building Inspector's files. Although the Petitioners complained that some houses were repiled without benefit of building permits or new certificates of occupancy, none of these houses were owned by any plaintiff. As the Connecticut Supreme Court pointed out, it is more difficult to think of a series of actions more "open and notorious" than removing a house from its foundations, demolishing the old concrete slab upon which it had rested,

installing new pilings with a large and noisy diesel or drop hammer, and replacing the houses on newly constructed foundations. Finally, as the Connecticut Supreme Court pointed out, there is irony in the homeowners' position that even though they lived in the houses which had settlement problems, or near houses that did have such settlement problems, they were "ignorant of a cause of action," while City officials and the City somehow knew about the problems but concealed them. It is also ironic that in 1977, the City paid over $14,000.00 for an engineer to determine possible solutions to the problems, and this engineer was the homeowners' main expert witness at the trial.

Because there was absolutely no communication between the homeowners and City officials before or after they purchased their homes, because all of the records were open to the public, and because the City cooperated with the plaintiffs paying substantial money to have an investigation done and the problems determined, there is no reason for the U. S. Supreme Court to take the unprecedented step of granting a Petition for Certiorari in order to "second guess" the Connecticut Supreme Court on a decision involving a state statute.

C. Even if this court were to grant a petition to review a state court's factual determination involving a state statute, this litigation would still continue since the Connecticut Supreme Court never addressed the legal issues concerning liability of a building inspector who negligently issues a certificate of occupancy.

Even if this court were to decide, for the first time, to grant a Petition for Certiorari to review a State Appellate Court's decision, on the facts, concerning a state statute, that defines fraudulent concealment, this would

not be the end of the litigation. Although never decided in Connecticut, the overwhelming majority of the fifty states have decided that even the negligent issuance of a certificate of occupancy will not make a municipality or a building official liable in damages, if it is later determined the house was constructed in violation of the basic building code. Attached hereto as Appendix B is a list of the states which, either by statute or case law decision, have made such determination that a municipal or state inspector is not liable for the wrongdoing of a third party, simply because such official failed to detect such wrongdoing.

It is unlikely that Connecticut will ever reach this question, since it has recently adopted a state tort claims act, which bars any liability for the negligent issuance, or failure to issue, any permit, certificate, or approval. Section 13 of Public Act 86-338 states as follows:

> Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer, or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . (7) the issuance, denial, suspension, or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order or similar authorization, when such authority is a discretionary function by law, when such issuance, denial, suspension or revocation or such failure or refusal constitutes a reckless disregard for health or safety . . .

Issues raised by the City and its Chief Building Official as to liability, and not yet decided by the Connecticut Supreme Court, include the following issues: whether the City is not liable for negligent issuance of a certificate of occupancy; whether the issuance of a certificate of occu-

pancy, by itself, cannot legally be a nuisance; whether the City is not responsible for intentional acts of fraud or fraudulent concealment of any of its employees; whether the issuance of a certificate of occupancy, based upon a complex building code is a matter of discretion, and whether negligence in the enforcement of this complex document is a violation of a public duty, for which a municipal official can be liable.

Even if this court were to grant the petition, and reverse the Connecticut Supreme Court on a factual issue, this would not end the litigation. The Connecticut Supreme Court would have to then determine the legal issues raised by both the City and its Building Inspector.

III. CONCLUSION

For the above stated reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

A. Connecticut Supreme Court cases affirming a trial court's decision to set aside a jury verdict and enter a judgment contrary to the verdict, or directing the trial court to do so.

Bliss vs. Bange, 6 Conn. 78 (1826) (Jury verdict for defendant, after he forced plaintiff off his property, claiming as a special defense title to the land; motion for judgment *n.o.v.* granted by trial court; no error).

Howe vs. Raymond, 74 Conn. 68, 49 A. 854 (1901) (Jury verdict for plaintiff, set aside and judgment entered for defendants; no error; action by indorsee to recover a promissory note; "It is only when the verdict is manifestly and palpably against the evidence in the case . . . that it should be set aside . . . This power of supervision and correction which the judge has over the verdict is an essential part of the jury system . . .")

Fell vs. Hancock Mutual Life Insurance Co., 76 Conn. 494, 57 A. 175 (1904) (Trial court set aside verdict for plaintiff in a suit on a life insurance policy; Supreme Court affirmed decision of trial judge in setting aside verdict for plaintiff, and entering judgment for defendant, based upon the fact the verdict was against the evidence).

Roma vs. Thames River Specialties Co., 90 Conn. 18, 96 A. 169 (1915) (Jury verdict for plaintiff in personal injury case set aside by trial court, and judgment entered for defendants; no error).

Sommers vs. Adelman, 91 Conn. 596, 101 A. 7 (1917) (Jury verdict for plaintiff, set aside by the court as against the evidence; no error; testimony of plaintiff was contrary

to overwhelming physical evidence and evidence of all witnesses as to exercise of due care in automobile accident).

Lamenza vs. Shelton, 96 Conn. 403, 114 A. 96 (1921) (Jury verdict for defendant tenants in action for summary process; motion for judgment *n.o.v.* granted by trial court; no error).

Munson vs. Atwood, 108 Conn. 285, 142 A. 737 (1928) (Trial court set aside jury verdict for plaintiff, and entered judgment for defendant; no error).

Marcil vs. Merriman and Sons Inc., 115 Conn. 678, 163 A. 404 (1932) (Jury verdict for plaintiff in personal injury case set aside, and judgment directed for defendant; no error).

Joanis vs. Engstrom, 135 Conn. 248, 63 A. 2d 151 (1948) (Jury verdict for plaintiff, set aside and judgment for defendant entered; no error; plaintiff's decedent died as a result of a three car collision, and the physical facts and all the testimony of various witnesses were contrary to the jury verdict).

Robinson vs. Southern New England Telephone Co., 140 Conn. 414, 101 A. 2d 491 (1953) (Jury verdict for plaintiff, which the court set aside, and rendered judgment for the defendant notwithstanding the verdict; no error; plaintiffs sued telephone company for failure to put a call to the fire department, to report a fire at plaintiff's house; Supreme Court agreed that there was no evidence connecting the failure to contact the proper fire department, and the damages to plaintiff's house).

Fisher vs. Jackson, 142 Conn. 734, 118 A. 2d 316 (1955) (Jury verdict and judgment for plaintiff; Supreme Court ordered that judgment be directed for defendant; newspaper reporter sued managing editor, and five years later was discharged; no evidence that this was a breach of contract for "permanent" employment).

Rickey vs. E.H. Jacobs Mfg. Co., 142 Conn. 495, 115 A. 2d 336 (1955) (Jury verdict for plaintiff reversed; Supreme Court directed judgment for defendant; delivery man cut his wrist on a pane of glass in an overhead door, which he raised to make deliveries, and it suddenly fell down, and when he tried to stop it, he put has hand through the pane of glass; defendant entered no evidence, and plaintiff introduced no evidence of a defect in the door).

Libero vs. Lumbermens Mutual Casualty Co., 143 Conn. 269, 121 A. 2d 622 (1956) (Jury verdict for plaintiff set aside by the court, and judgment entered for defendants; no error; suit against insurance company for failure to pay judgment against insured).

Parowski vs. Bridgeport Hospital, 144 Conn. 531, 134 A. 2d 834 (1957) (Verdict for plaintiff against two defendants, and trial court entered judgment against one defendant, but directed verdict for the named defendant notwithstanding the jury verdict; no error; plaintiff's decedent fell or jumped from window of hospital, and judgment directed for hospital).

Palmieri vs. Macero, 146 Conn. 705, 155 A. 2d 750 (1959) (Jury verdict for plaintiff, which the court set aside, and then entered judgment notwithstanding the verdict for defendant; no error; passenger sued driver, who for some reason drove off the road on the Pennsylvania Turnpike,

either asleep, or due to a heart attack; since plaintiff was asleep, and there was no evidence as to what caused the driver to go off the road, there was no evidence for the finding of the jury that the driver was negligent).

Noebel vs. Housing Authority, 146 Conn. 197, 148 A. 2d 766 (1959) (Jury verdict and judgment for plaintiff; error, judgment directed for defendant; housing authority had no duty with respect to attempt to jump over a wire barrier, since there was no nuisance or negligence).

Stavenezer vs. Sage-Allen and Co., 146 Conn. 460, 152 A. 2d 312 (1959) (Verdict and judgment for plaintiff, who sued store employee for falsely accusing her of not paying for food; Supreme Court directed judgment for defendant, finding no cause of action for slander or any other recognizable cause of action).

Attardo vs. Ambriscoe, 147 Conn. 708, 166 A. 2d 458 (1960) (Jury verdict for plaintiff, which the court set aside, and entered judgment for the defendant notwithstanding the verdict; no error; 7-year old boy, trespassing, fell through an open stairwell in a house under construction; there was no evidence that the defendant knew, or was chargable with knowledge, of the likelihood that children would trespass upon his property).

Fabrizio vs. Youhas, 148 Conn. 426, 172 A. 2d 69 (1961) (Jury verdict for plaintiff against two defendants; trial court set aside verdicts, and entered judgment for both defendants; error; Supreme Court directed trial as to one defendant, and found no error as to entering judgment for the other defendant; plaintiff's decedent fell down cellar stairs, and there was no evidence to support verdict

against one defendant, who was not present, and not aware of the visit of decedent).

Hale vs. Crestline Realty Inc., 148 Conn. 643, 173 A. 2d 500 (1961) (Jury verdict for plaintiff, set aside by court and judgment entered for defendant notwithstanding the verdict; no error; 8-year-old boy injured by falling out of large tree on property, and there was no evidence that owner knew the children played on land, or used tree for play).

Petrillo vs. Bess, 149 Conn. 166, 179 A. 2d 600 (1961) (Verdict and judgment for plaintiff; Supreme Court ordered judgment directed for defendant, where plaintiff claimed defendant was liable under statute for starting a fire, which ultimately spread to plaintiff's house; the Supreme Court found that the verdict was in conflict with the indisputable physical facts).

Vacca vs. Della Camera, 149 Conn. 277, 179 A. 2d 616 (1962) (Verdict and judgment for plaintiff; Supreme Court ordered that judgment for defendant be directed; plaintiff fell as ladder which he was descending toppled over; "We are of the opinion that the jury misapplied the law as given to them by the court or were actuated by other motives in finding against the defendant. . . ." at page 281).

Masterson vs. Atherton, 149 Conn. 302, 179 A. 2d 592 (1962) (Verdict and judgment for plaintiffs; Supreme Court ordered judgment directed for defendant; four people injured and two killed as a result of a fire in an apartment; Supreme Court found that there was no evidence to support any claim of negligence on behalf of landlord

or repairman, who repaired furnace prior to the fire; "Section 234 of the Practice Book is practically identical, in its wording, with Rule 50(b) of the Federal Rules of Civil Procedure . . . cases construing and applying Rule 50(b) are of persuasive . . . authority . . ." at page 316).

Louche vs. Silvestri, 149 Conn. 373, 179 A. 2d 835 (1962) (Jury verdict and judgment for plaintiffs reversed by Supreme Court, who ordered judgment directed for defendant; a 12-year old boy fell from a tree on land which he was trespassing; the Supreme Court found that the tree was not a structure or artificial condition, necessary to create a cause of action).

Lewis vs. Kasimer, 153 Conn. 13, 211 A. 2d. 837 (1965) (Jury verdict for plaintiff, set aside by court and judgment for defendant notwithstanding the verdict entered; no error; tenants sued landlord for damages resulting from fall, and court decided that there was no evidence as to control).

Monahan vs. Montgomery, 153 Conn. 386, 216 A. 2d. 824 (1966) (Verdict and judgment for plaintiff; Supreme Court found error, and ordered judgment directed for defendant; Plaintiff's decedent was raking a pile of debris, fell, and sued on the grounds that a branch was a defect; the Supreme Court found there was no evidence that the branch being raked by the plaintiff was a defect).

Haffey vs. Lemieux, 154 Conn. 185, 224 A. 2d. 551 (1966) (Jury verdict for plaintiff against husband and wife own-

ers of one-family house; trial court granted motion for judgment *n. o. v.* in favor of the defendant wife, on grounds there was no proof of her knowledge of the defective condition; no error).

Farlow vs. Andrews Corporation, 154 Conn. 220, 224 A. 2d. 546 (1966) (Jury verdict for plaintiff for damages caused a fall on an icy sidewalk in front of an office building; trial court granted motion for judgment *n. o. v.* in favor of the defendant; no error, as there was no proof that the defendant had the necessary possession and control to support the jury finding of liability).

Vuono vs. Eldred, 155 Conn. 704, 236 A. 2d. 470 (1967) (At the close of the jury trial, the court directed a verdict for the defendant, and the court later granted a motion to set aside the verdict, and entered judgment for plaintiffs; Supreme Court found error, and ordered judgment entered in favor of defendant; plaintiff sued for personal injuries arising out of a two-car accident, and there was no evidence as to ownership or agency).

Levitz vs. Jewish Home for the Aged Inc., 156 Conn. 193, 239 A. 2d. 490 (1968) (Jury verdict for the plaintiff against one defendant set aside, and judgment rendered for the defendant; no error; Supreme Court agreed with trial court that jury could not reasonably or logically have found that driver of car that hit plaintiff was the agent of a corporation).

Guglielmo vs. Klausner Supply Co., 158 Conn. 308, 259 A. 2d. 608 (1969) (Jury verdict for plaintiff set aside, and judgment entered for defendant notwithstanding the verdict; affirmed; plumber injured from fumes of compound, and plaintiff failed to prove negligence or allege or prove a claim in strict liability).

Bears vs. Hovey, 159 Conn. 358, 269 A. 2d. 77 (1970) (Jury verdict for plaintiff, set aside by the trial court and judgment entered for defendants notwithstanding the verdict; no error; sledding accident, where young child was injured, and there was no proof of a duty by the land owner, since there was no evidence the defendants knew of sleigh riding or a snow fort which had recently been built by other children on defendant's land).

State vs. Kelsey, 160 Conn. 551, 274 A. 2d. 151 (1970) (Jury verdict of guilty; motion for judgment *n. o. v.* based upon insufficiency of evidence denied by trial court; error; judgment directed on grounds of insufficient evidence, concerning the crime of breaking and entering and larceny).

Bartholomew vs. Catania, 161 Conn. 130, 285 A. 2d. 350 (1971) (Jury verdict for plaintiff, which trial court set aside, and entered judgment for defendants notwithstanding the verdict; no error; there was no evidence, even though considered in the light most favorable to the plaintiff, that the defendants were liable when the plaintiff fell on an allegedly defective sidewalk).

Toomey vs. Danaher, 161 Conn. 204, 286 A. 2d. 293 (1971) (Jury verdict for passenger in one car accident, against deceased driver, where there was no evidence of excessive speed, since plaintiff had a retrograde amnesia; trial court refused to set aside verdict; error; judgment for plaintiff set aside since there was no evidence of negligence or of excessive speed).

DeRubbo vs. Aetna Insurance Co., 161 Conn. 388, 288 A. 2d. 430 (1971) (Jury verdict for plaintiffs against insurance company pursuant to statute for failure to pay judgment against driver; trial court refused to grant judgment

n. o. v.; error, judgment directed, since as a matter of law the facts showed that the driver was not insured under the policy).

Bogart vs. Tucker, 164 Conn. 277, 320 A. 2d. 803 (1973) (Jury verdict for plaintiff against the drivers of two other cars; trial court denied motion for judgment *n. o. v.;* error; judgment directed for one defendant, since there was insufficient evidence of any proximate cause between negligence of that particular vehicle).

Meade vs. Warehouse Transport Inc., 165 Conn. 553, 338 A. 2d. 111 (1973) (Jury verdict, set aside by the trial court and judgment for the defendants notwithstanding the verdict; no error; there was no evidence from which the jury could have found or inferred that a motor vehicle accident was caused by the negligence of a deceased operator).

Derby vs. Connecticut Light and Power Company, 167 Conn. 136, 355 A. 2d. 244 (1974) (Jury verdict for seven-year-old girl, who climbed an apple tree on property owned by the utility company; trial court refused to grant motion for judgment *n. o. v.;* error; judgment directed for defendant, since there was no evidence that the utility company knew or had reason to believe that a dead limb would involve an unreasonable risk of harm to a child).

O'Brien vs. Cordova, 171 Conn. 303, 370 A. 2d. 933 (1976) (Jury verdict for plaintiff in two car accident; trial court refused to grant motion for judgment *n. o. v.;* error; judgment directed for defendant since there was no evidence of negligence sufficient to remove the issue from the field of surmise and conjecture).

Conte vs. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A. 2d. 144 (1976) (Jury verdict for plaintiff entered; error;

Supreme Court directed that judgment enter for the defendant Ford, in a breach of warranty action by a plaintiff who claimed that his automobile was not merchantable).

Beckenstein vs. Potter & Carrier, Inc., 191 Conn. 120, 464 A. 2d. 6 (1983) (Owners of a shopping mall recovered a jury verdict against the contractor and the manufacturer of certain roofing material; trial court granted motion for judgment *n. o. v.* of the manufacturer; no error; there was no evidence that there was an agency relationship between the manufacturer and the contractor).

APPENDIX B

Summary of law of 50 states and the District of Columbia, including those with State Tort Claims Acts, dealing with public officials of the state and municipality, who are held immune from civil liability for alleged acts of negligent inspection, failure to inspect, certification, licensing, misrepresentation or deceit.

1. *Alabama*: Section 11-47-190 waives municipal immunity, for negligence of a municipality's employees acting within the scope of their employment. "No city or town shall be liable for damages for injury . . . unless said injury or wrong was due to the neglect, carelessness or unskillfulness of some agent, officer or employee of the municipality engaged in work therefore and while acting in the line of his duty . . ." No other exceptions.

Rich v. City of Mobile, 410 So. 2d 385 (Ala. 1982). Homeowners sued City, claiming that City negligently inspected sewer lines connecting homeowners' residence and main system. Because city building inspectors failed to require installation of overflow traps the Plaintiffs' homes were constantly backed up with sewage.

> These policy considerations may be expressed in terms of the broader requirement of the City to provide for the public health, safety, and general welfare of its citizenry. While, as here, the individual homeowner is affected by the discharge of the City's sewer inspectors' duty, the City's larger obligation to the whole of its resident population is paramount; and *the imposition of liability upon the City, particularly where the Plaintiff's reliance upon the public inspection is secondary and incidental to their reliance upon the building contractor, necessarily threatens the benefits of such services to the public at large.* (410 So. 2d 385, at 387)

2. *Alaska*: Section 09.65.070 formerly provided that governmental immunity is waived for any torts of any municipality; in 1977, it was extensively amended so as to exempt all claims arising out of *inspection of properties* or discovery of any health or safety hazard; failure to abate any violation of any health or safety statute or regulations; any claim based upon any exercise or failure to exercise a discretionary function; any claim based upon *"the grant, issuance, refusal, suspension or denial of a license, permit, appeal, approval . . .* (emphasis added).

3. *Arizona*: Govermental immunity for state and municipalities abolished by Court; Section 26-314 gives state employees protection if negligent in exercise of discretionary functions.

Bagley v. State, 595 P. 2d 157 (Ariz. 1979). Miner's surviving spouse sued state and state officials for death of miner from cave-in of mine, stating that a week before the cave-in, the state mine inspector ordered the mine closed for failure to comply with safety standards, and the mine was still open when the cave-in took place. "The duties required of the State Mine Inspector under the mine operations statutes were of a public nature, and no private duty to any specific individual was created." At page 159.

Wesley v. State, 571 P. 2d 1057 (Ariz. 1977). Father of shooting victim in bar sued state liquor license department, for failure to revoke license of bar, after receiving official information of many instances of violence in bar. The Supreme Court stated "at most the liquor department owed a duty to the general public to investigate vio-

lations . . . the decision to suspend or revoke a license is quasi-judicial and is based upon the exercise of discretion . . . the duty is to the general public and is not narrowed to an innocent victim damaged by the act of a violator." (571 P. 2d 1057, at 1059).

Besserman v. Paradise Valley, Inc., 569 P. 2d 1369 (Ariz. 1977). Court of Appeals affirmed summary judgment for town and *building inspector,* when Plaintiffs sued, stating the town and building inspector were liable for "bad faith and malicious inspection" of their home by the building inspector and for damages based upon fraud. The Plaintiffs alleged this based upon a provision of the Building Code which stated: *"The building official or any employee charged with the enforcement of this Code, acting in good faith and without malice for the City in the discharge of his duties, shall not thereby render himself liable personally. . . ."* Section 202(g) of Uniform Building Code). The Court of Appeals stated that the negative of his section does not mean the building official is liable for bad faith; "the services performed by a building inspector are for the benefit of the public generally and not the individual and no cause of action will lie, absent special circumstances, for damages caused by a failure to inspect properly." (At page 1370).

The Court of Appeals stated that since there was no private duty in this case, the claim of fraud and claim of bad faith inspection should be dismissed.

Duran v. City of Tucson, 509 P. 2d 1059 (Ariz. 1973). Body shop employee sued City, Fire Department and Fire Chief for *negligent violation of fire prevention code* by permitting open flame heater in work area, which ignited

gasoline, causing serious burns. "We believe the Fire Code is analogous to a building code . . . (New York and Minnesota cases are cited for the proposition that) a Building Inspector acts exclusively for the benefit of the public, that the act performed is only for public benefit, and that an individual who is injured by the alleged negligent performance of Building Inspector does not have cause of action." At pages 1063, 1064.

4. *Arkansas*: Section 12-2901 "State subdivisions immune from tort liability"; all political subdivisions of the State are immune from liability for damages, and "no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees", 12-2903 requires liability insurance for motor vehicles operated or owned by political subdivisions.

5. *California*: Section 185 "Liability of Public Entities"; provides immunity for public entity or public officer "caused by its failure to make an inspection, or by reason of making an inadequate negligent inspection, of any property . . ." and "for issuance or denial of any permit, license, certificate, approval . . .".

Grenell v. City of Hermosa Beach, 153 Cal. Rptr. 315 (1980). Plaintiffs purchased beach-front property with two houses, and relied on City records that two dwelling units were legally authorized under the zoning law; the City records were mistaken, and the second unit on the property could not lawfully be rented. The purchasers sued the sellers, and the City.

The Court discussed the California Tort Claims Act, which exempts any public entity for *misrepresentation* by an employee, whether negligent or intentional. The

Court also looked to decisions under the Federal Tort Claims Act, and decided that the public employee could not be liable for his negligence.

Clayton v. Rossman, 133 Cal. Rptr. 306 (1976). Tenant's guest in apartment house sued City and others when he fell down flight of stairs, resulting in permanent disability because building permit for apartment house, issued after a review of the plans aand specifications and numerous followup inspections by other employees, failed to detect a *design failure in the stairs,* which caused a dangerous condition. California cited the provision of its Tort Claims Act, holding "a public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property . . . ". The Court cited the reasons by the legislative committee's comment to this exception.

> The immunity provided by this section covers negligent failure to make an inspection and negligence in the inspection itself. For example, the section makes a public entity immune from liability if its employee negligently fails to detect a defect in a building being inspected; . . . The section presupposes a duty on the part of public entities to inspect private property for health and safety purposes. *Indeed, it has been suggested that because of the extensive nature of the inspection duties of public entities, a public entity would be exposed to the risk of liability for virtually all property defects within its jurisdiction if this immunity were not granted.* (At page 309, emphasis supplied).

6. *Colorado*: Section 24-10-101 through 24-10-116 "Governmental Immunity"; a public entity shall be im-

mune from liability in all claims for injury with certain exceptions, to include the operation of a motor vehicle, the operation of any public hospital, correctional facility, or jail; a dangerous condition of any public building; a dangerous condition on public highways; a dangerous condition of any public facility; the operation of certain utilities; the term "operation" is defined so as not to include "a *negligent or inadequate inspection or a failure to make an inspection of any property*" (24100-103(3)(b)(ii)); written notice required within 180 days after the date of the discovery of the injury; limitation on judgments $150,000 per person; $400,000 maximum for any number of individuals for claims arising out of a single occurrence.

* * *

8. *Delaware*: 10 Section 4010 through 4013: waives governmental immunity for counties and cities and their employees for all torts, except "the undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, *granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial;* the performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused . . ." Section 4011(b)(2) and (3); also, there is no immunity when the government operates any motor vehicle or other equipment, operates or maintains any public building facilities or equipment to be designed for use by the public, and pollutes; limitation of damages is $300,000 for any and all claims arising out of a single occurrence. Enacted in 1978.

9. *District of Columbia*: Section 1-1202 allows the Mayor of the District of Columbia to settle claims and suits against the District of Columbia arising out of negligence if a private individual would be liable for damages; there does not appear to be any provision waiving governmental immunity if there is no settlement by the Mayor. Another section, 1-1212, waives governmental immunity for negligent operation of vehicles; effective 1975. Case law indicates that there is a broad abrogation of immunity.

10. *Florida*: Statute Section 768.28 "Waiver of Sovereign Immunity in Tort Actions". Tort Claims act waives immunity for any action at law against State or its subdivisions . . . "If a private person would be liable to the claim and in accordance with the general laws of this State . . ."; no punitive damages or interest allowed prior to judgment; maximum payment of $100,000 per claim, $200,000 for all claims arising out of the same incident. Notice of claim required. No liability of municipality if an officer acted "in bad faith or with malicious purpose or in a manner exhibiting wanton and wilful disregard of human rights"; nor is there liability for a City employee who acted "outside the course and scope of his employment".

11. *Georgia*: Section 36-33-1 "Liability of Municipal Corporations for acts or omissions of officers"; waives immunity "for neglect to perform or improper or unskilled performance of ministerial duties"; no liability for "exercising their discretion" (36-33-2); personal liability of public officer only if act done "oppressively, maliciously, corruptly, or without authority of law" (36-33-4); written demand within six months a prerequisite for suit (36-33-5).

12. *Hawaii*: Sections 662-1 through 662-16. "State Tort Liability Act" creates liability with some exceptions, to include any claim "based upon the exercise or performance of the failure to exercise or perform a discretionary function . . . whether or not the discretion involved has been abused". (Section 662-16); also intentional torts including "misrepresentations" and "deceit" are exempted; apparently, from the case law, portions of the State Tort Liability Act applied to municipalities by judicial decision.

13. *Idaho*: Section 6-902 through 6-928 "Idaho Tort Claims Act"; effective 1971; every governmental entity is subject to liability, whether arising out of governmental or proprietary function, "If a private person or entity would be liable for money damages". (Section 6-903); exceptions to liability; if act or omission is based upon "the exercise or the failure to exercise or perform a discretionary function, whether or not the discretion be abused"; written claim required within 120 days of act or omission (Section 6-906); no liability for punitive damages (6-918).

Carroll v. U.S., 488 F. Supp. 757 (DC Idaho, 1980). Plaintiff sued for injuries sustained as a miner, when federal mine inspectors inspected his work place pursuant to the Federal Mine Safety Act, because the inspector negligently implemented an accident prevention program mandated by the government at federal job sites. The District Court held that no private right of action arises under the Mine Safety Act, and there is no equivalent state right of action in Idaho. ". . . it is universally recognized that the conduct of similar safety inspections by government inspectors during the course of work being performed by government contractors on federal-owned land does not give rise to such a duty." At page 759.

Dunbar v. United Steel Workers of America, 602 P. 2nd 21 (Idaho, 1979). Wrongful death action brought against the miners' union and the State, because of fire in a silver mine which claimed 91 lives. The Plaintiffs alleged that both the union and the State were jointly liable, because both misrepresented the safety of the mine, failed to adequately carry out a safety program, and negligently failed to require adequate protection in the event of fire (fire drills, personal protective equipment, emergency egress, evacuation on evidence of smoke). The Plaintiffs further claimed that the State was required by law to inspect each mine once annually, issue violation notices, and, if the violation notices are not complied with, close the mine. The Plaintiffs alleged that the mine inspector failed to follow such statutory provisions. The Idaho Supreme Court reviewed federal decisions under the Federal Tort Claims Act, 28 USC Section 2680(a) and decisions of other states. The Court determined that there is no coherent doctrine in determining what is "discretionary" and what is "ministerial", or what is public or a private duty. The Court nevertheless rejected liability for failure to inspect or for a negligent inspection:

> At one extreme, we find decisions which appear to make a mockery out of the oft-repeated maxim of Jackson, J., dissenting in *Dalehite*, that "it is not a tort for a government to govern." (At page 43).
>
> We hold that our legislature has intended that wherein tort liability would attach to a private person, a governmental entity engaging in the same conduct will be liable. *We do not ascertain and intend to create a new cause of action against a governmental entity for its attempts to govern. We postulate that if government is not able to govern, anarchy and chaos are the only alternatives.* If government is to govern,

persons must be selected to operate and implement the abstract notions of what government should do . . . it must be able to provide standards of conduct whether they be called statutes, regulations, ordinances . . . such functions of government have traditionally been seen as sacrosanct from invasion by the judicial branch.

Here we are faced with claims against the government relating to the governmental function of governing. There are not parallel functions in the private sector. We are essentially concerned with the abilities of officials, the enactment of regulations, and the enforcement of standards. *A finding of liability for breach of those "duties" . . . (would) creation of a new cause of action which we deem not to be contemplated by our legislature, and foreign to traditional concepts of the law of torts.* (emphasis supplied).

14. *Illinois*: Chapter 85 Section 1-101 "Tort Immunity Act" provides immunity for *local public entities for issuance or denial of any permit, license, certificate . . .; provides immunity for failure to make inspection or for negligent inspection of property;* provides immunity for exercise of discretion; requires notice of claim; $100,000 maximum liability.

Hannon v. Coulihan, 369 N.E. 2d 917 (Ill. 1977). House owners sued developer, contractor, subcontractor, and village, alleging that they owned land in Deer Park, hired the builder to build a prefabricated house, a building permit was issued and the village later issued a "stop work" order because the foundation was not in compliance with the building code, even though the house was substantially complete and the roof was on. The Plaintiff alleged that the village Building Inspector failed to make proper inspection, so as to catch the noncompliance prior to the substantial construction of the house. The Supreme Court

cited Illinois, New York, Washington State, and Minnesota decisions stating that the statutory abrogation of sovereign immunity still did not create any new cause of action, and that the purpose of a building code is to protect the public in general, not specific individuals. "To recognize such a duty here would be to make a municipality substantially an insurer of all construction it undertook to inspect and control through its building codes and would likely discourage all efforts at such control." (369 N.E. 2d 917, at 922).

15. *Indiana*: 34-4-16.5-1 through 16.5-19; effective 1974, waives governmental immunity for cities and other political subdivisions, except for "the performance of a discretionary function" (16.5-3(6); "the issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval . . . where the authority is discretionary under the law" (16.5-3(10); "*failure to make an inspection, or making an inadequate or negligent inspection of any property . . .*" (11); maximum liability is $300,000 for injury, $5 million for all injuries resulting from one occurrence; no liability for punitive damages (16.5-4); suit is barred unless notice of claim is filed within 180 days after the loss occurs (16.5-7).

State v Morgan, 432 N.E. 2d 59 (Ind. 1982). Plaintiff sued when truck left roadway, went into abandoned strip mining pit that was flooded with water, and Plaintiff's decedent drowned. The Court rejected the claim that the negligent issuance of a permit, and the negligent release of the bond, violated the Plaintiff's rights: "The Strip Mining law was not a safety regulation law. Its purpose, focus and provisions dealt with the reclamation of strip land."

16. *Iowa*: 613A.1 through 613A.11 "Tort Liability of Governmental Subdivisions"; waives governmental immunity for all torts except claims under the workers' compensation law, claims dealing with the assessments of collection of taxes, claims based upon an act or omission of an officer or employee in the execution of a statute or ordinance, or any claim as to which the municipality is immune from liability by the provisions of any other statute; written notice of claim required within six months after the tort; there is no limit on damages. Effective 1968.

17. *Kansas*: Section 75-6101 through 75-6118 "Kansas Tort Claims Act"; waives immunity for all torts by employees, "if a private person would be liable under the laws of the state"; exempts discretionary acts; maximum liability of $500,000 for any number of claims arising out of a single occurrence or accidents; no liability for punitive damages; no requirement to indemnify employee if act arises out of "actual fraud or actual malice". This act effective 1979.

18. *Kentucky*: For claims against state, there is a court of claims procedure with maximum liability of $50,000 per claim; municipal immunity has been abolished by the judicial decision, and there is no Tort Claims Act as far as municipalities are concerned. The exceptions to the abrogation of municipal immunity are set forth in the case law.

Howes v. Childers, 512 F. Supp. 745 (E.D. Ky. 1981). Summary judgment granted to mine inspector, where Plaintiff alleged that death was caused by the negligence of eight mine inspectors. The Federal Court found no li-

ability under the Federal Tort Claims Act or under Kentucky law.

For the same result, see *Taylor v. United States*, 521 F. Supp. 185 (W.D. Ky. 1981), and *Raymer v. U.S.*, 660 F. 2d 1136 (6th Cir., 1981).

Department of Banking and Securities v. Brown, 605 S.W. 2d 497 (Ky. 1980). The Supreme Court reversed a decision of the Court of Appeals, which held the Commissioners of the State Securities Department liable in damages for negligent regulation of two building and loan associations, even though known to the Department to be in financial trouble. The Supreme Court stated that the Tort Claims Act renders the State liable, as any individual, for negligence. The Court held

> *There is no public policy requiring government to guarantee the success of its efforts.* When the governmental entity is performing a self-imposed protective function . . . the individual citizen has no right to demand recourse against it though he is injured by its failure to effectively perform such function. *Any ruling to the contrary would tend to constitute the Commonwealth an insurer of the quality of services its many agents perform and serve only to stifle government's attempts to provide needed services to the public which could not otherwise be effectively supplied.* . . . We perceive that the public interest is better served by a government which can aggressively seek to identify and meet the current needs of the citizenry, uninhibited by the threat of financial loss . . . (605 S.W. 2d 497, at 499, emphasis supplied).

Grogan v. Commonwealth of Kentucky, 557 S.W. 2d 4 (Ky. 1979). A fire at a supper club in Southgate, Kentucky, caused a great number of deaths and person injuries, because the City failed to enforce its safety code and

the failures were a substantial factor in causing the tragedy. The Supreme Court stated that the municipality was protected under the Tort Claims Act, because it was a violation of a public duty.

> We do not believe that the common law, as applied to individuals, offers any reasonably comparable situation . . . in the enactment of laws designed for the public safety or governmental unit does not undertake to perform the task; it attempts only to compel others to do it, and as one of the means of enforcing that purpose it may direct its officers and employees to perform an inspection function. The failure of its officers and employees to perform that function 'does not constitute a tort committed against an individual who may incidentally suffer injury or damage, in common with others, by reason of such default' ". Page 5.
>
> We acknowledge, however, that a legal problem of this magnitude should not be resolved by the tricks of mechanical logic. The answer must find its source in conscious public policy, and the fundamental policy-viewpoint on which this Court has settled during the 15 years (a Kentucky 1964 decision) is that a government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers (including, of course, those yet unborn) to liability for failures or omission in its attempts to enforce them. *It is better to have such laws even haphazardly enforced, than not to have them at all.* (At page 6, emphasis supplied).

19. *Louisiana:* Article 12, Section 10, Constitution of 1974, allows suits against the State or any political subdivision, and repeals governmental immunity; subsection 3 forbids any execution against any political subdivision, and allows collection of a judgment against a political subdivision only if the political subdivision appropriates funds against which the judgment can be paid; one decision states

that a municipality does not have to appropriate funds, as the decision to do so is discretionary. *DeLaureal Engineers, Inc. v. St. Charles Parish,* 406 So. 2d 770 (1981).

Dufrene v. Guarino, 343 So. 2d 1097 (La. 1977). Plaintiff sued various State and City fire inspectors and building inspectors, since Plaintiff was injured in a fire, in a lounge where inadequate exits violated the Building Code and Fire Code, preventing escape. The Court of Appeals held that there was no individual duty to the occupants of the lounge.

20. *Maine*: Title 14 Section 8101 et seq. "Tort Claims"; imposes immunity for Tort Claims as to all governmental entities, with a specific statement as to particular immunities, to include *"the granting, granting with conditions, refusal to grant or revocation of any license, permit, order, or other administrative approval or denial;* maximum liability of $10,000 for any and all claims arising out of a single occurrence.

21. *Maryland*: Art. 23A, Section 1B: "Immunity from Civil Liability in Tort Action"; grants immunity to all officials of a municipal corporation "while acting in a discretionary capacity, without malice, and within the scope of their employment . . ."; requires indemnity by City.

22. *Massachusetts*: Chapter 258 Section 1 through 13 "Claims and Indemnity Procedure"; creates liability against municipalities "in the same manner and to the same extent as a private individual under like circumstances"; limits recovery to $100,000 and prohibits interest prior to judgment and punitive damages; requires indemnity to public employees with a maximum liability of

$1 million; prohibits indemnity for gross negligence, or wilful or malicious conduct; exempts any claim based upon the exercise or failure to exercise a discretionary function, whether or not the discretion is abused; exempts any claim based upon an act or omission "when such employee is exercising due care in the execution of any statute".

Dinsky v. Framingham, 438 N.E. 2d 51 (Mass. 1982). Plaintiffs owned a single family house in Framingham, and they sued the Town of Framingham alleging *negligence in issuance of building permits and certificates of occupancy.* The Plaintiffs alleged that the building inspector had in his file several letters from the Department of Health stating that the lots upon which the houses were built had to be graded, to avoid drainage problems; three years after the certificates of occupancy were issued, despite the fact no proper grading or drainage was done, the Plaintiffs experienced serious flooding, causing large cracks to develop in their foundation walls. The Supreme Court affirmed the decision of the trial Court, stating the town did not violate a duty owed to them as individuals.

> We have examined the State Building Code . . . there does not appear to be any language in the enactments which would warrant a finding that the legislature intended to create private causes of action for property owners . . . *we conclude that we will not depart from the majority rule that in the absence of a special duty owed to the Plaintiffs, different from that owed to the public at large, no cause of action for negligent inspection can be maintained. To hold otherwise would cause a municipality to become substantially an insurer of each and every construction project. The tremendous exposure to liability that could result from such a decision would likely dissuade municipalities from enacting regulations designed for the protection and welfare of the public.* (438 N.E. 2d 51, at 55-6, emphasis supplied).

23. *Michigan*: Section 3.996(107) preserves governmental immunity for "all government agencies" if the government agency is engaged "in the exercise or discharge of a governmental function".

Stemen v. Coffman, 285 N.W. 2d 305 (Mich. 1979). Two individuals resided in a tenement in Grand Rapids, Michigan; it was inspected in 1975 by a City Housing Inspector, and it had received a Certificate of Compliance signed by the City Housing Inspector. They sued the City, the Fire Chief and Fire Inspector, and the Housing Inspector. The trial Court entered summary judgment in favor of the City and its individual employees. The Plaintiffs appealed, relying upon the common law action of nuisance. The Appellate Court rejected the nuisance theory, quoting 58 AmJur2d, Nuisances, Section 49, page 616: "Liability for damage caused by a nuisance turns upon whether the Defendant was in control, either through ownership or otherwise." Since the City did not own the building, control the building, create the nuisance, or employ others to do work which constituted a nuisance, the City's relationship was found to be "attenuated". "To hold the City liable under the nuisance exception in this case would stretch the concept of liability for nuisance beyond all recognition." The Appellate Court also decided that the Building Inspector, in order to determine whether conditions in the field complied with the applicable code provisions, exercised a discretionary function.

Gerneth v. Detroit, 465 F. 2d 784 (6th Cir. 1972). Plaintiff was shot by a private guard, employed by Greyhound Bus in Detroit, Michigan. Plaintiff sued the Detroit Police Department since they issued a weapons license, even though their regulation stated that no license could

be issued to someone convicted of a felony. The guard had previously been convicted of a felony involving the careless use of firearms. The Court of Appeals sustained the dismissal of the action by the trial Court, based upon Michigan law that the Police Department owed no duty to the Plaintiff, since the duty of the City to license private patrolmen did not create any duty to private persons, the violation of which would justify an action for damages.

24. *Minnesota:* Section 466.01 through 466.15 "Tort Liability, Political Subdivisions"; exempts "discretionary acts"; requires notice of claim; sets maximum liability of $500,000.

Hage v. Stade, 304 N.W. 2d 283 (Minn. 1981). Estate of people killed in hotel fire sued hotel, City, and various State and City employees, alleging negligent inspection, since the hotel lacked smoke detectors, sprinklers, fireproof partitions, properly designed stairwells, and since flammable materials were stored in the basement. The hotel had been inspected in 1975 and 1976; the fire occurred in 1977. Plaintiffs stated that State and City agents failed to perform a requested annual inspection, negligently conducted inspections that did take place, and failed to require correction of safety hazards known to them. The Supreme Court stated that even though the Minnesota Tort Claims Act abolished the common law doctrine of sovereign immunity, both against the State and the City, the distinction between public duties and special duties is still valid. A duty owed to the public in general cannot be a basis of negligent action. In special situations, a general duty may be narrowed to a special duty where the municipality has undertaken the respon-

sibility of not only protecting itself, but a particular class of persons; the government must have actual knowledge of the dangerous condition; reasonable reliance by Plaintiffs must have been induced by the government; the Plaintiff must have been opted to forego other alternatives to protect themselves; finally, the statute must set forth mandatory acts clearly for the protection of a particular class of persons, and the government's actions must increase the harm.

Gelley v. Astra Pharmaceutical Products Inc., 610 F.2d 558 (8th Cir. 1979). Plaintiff sued under Minnesota law and Federal Tort Claims Act, alleging that the Food and Drug Administration had licensed a drug as "safe for use", and allowed its introduction into interstate commerce, even though said drug caused the death of Plaintiff's decedent. The Eighth Circuit found that there was no cause of action under either Minnesota law or the Federal Tort Claims Act. "Regulatory activity engaged in by FDA personnel simply has no counterpart in private activity and thus cannot give rise to liability under the common law. Minnesota recognizes no private cause of action for violations of governmental duties owed the public in general, similar to those duties performed by the FDA." The Eighth Circunt further found that the Food, Drug and Cosmetic Act of 1976 was not intended to protect any particular class of persons; FDA officials could not know that Plaintiff's decedent would suffer an adverse reaction to the drug; finally Plaintiff's decedent could not rely on specific actions or representations of the FDA as an assurance of safety. Finally, the Eighth Circuit stated that the "discretionary function" exception of the Federal Tort Claims Act also applied.

Cracraft v. the City of St. Louis Park, 279 N.W. 2d 801 (Minn. 1979). Two high school youths were killed, and one received severe burns over 50% of his body, when a 55 gallon drum of duplicating fluid ignited on the loading dock of the high school; less than 30 days before the explosion, the City Fire Inspector conducted an inspection, listed several violations, in a letter which said nothing about the drum. The Supreme Court stated that even though the Tort Claims Act abolished governmental immunity, the Court cannot depart from

> vast precedent and traditional common-law principles of negligence. The distinction is not merely a relic of the verbiage used by courts in days of sovereign immunity. Instead, it is corollary to a basic tenant of negligence law: general duties owed to the entire public rather than a specific class of persons cannot form the basis of a negligence action." (279 N.W.2d 801, at 804).
>
> The municipality's own ordinance required that it undertake inspections for fire code violations. However, such inspections are required for the purpose of protecting the interest of the municipality as a whole against the fire hazards of the person inspected. *The inspections are not undertaken for the purpose of assuring either the person inspected or third persons that the building is free from all fire hazards, just as the State's issuance of a driver's license is no assurance that the licensed person will be a safe driver* . . . . But, without intending to be exhaustive, there are at least four factors which should be considered. First, actual knowledge of the dangerous condition is a factor which tends to impose a duty of care on the municipality. Second, reasonable reliance by persons on the municipality's representations and conduct tends to impose a duty of care. Of course, reliance on the inspection in general is not sufficient. Instead, the reasonable reliance must be based upon specific action

> or representations which cause the persons to forego other alternatives of protecting themselves. Third, a duty of care may be created by an ordinance or statute that sets forth mandatory acts clearly for the protection for a particular class of persons rather than the public as a whole. Finally, the municipality must use due care to avoid increasing the risk of harm. (279 N.W.2d 801, at 806-7.

The Supreme Court concluded that if the traditional law of "public duty" were to be expanded and changed,

> . . . it is better that the legislature act in this field where extensive hearings can be conducted to consider the extent of the financial impact of such a basic change . . . municipalities will often be named as defendants in a host of litigation where they presently have no exposure. The cost of defense is a vital ingredient in procuring insurance or providing self-insurance for such litigation . . . the creation of a new duty owed by municipalities and other governmental entities to enforce the law with reasonable care is a change which should be made by the legislature. We will not assent to such a change by the judiciary (279 N.W.2d 801, at 808).

Hoffert v. Owatonna Inn Town Motel, Inc., 199 N.W. 2d 158 (Minn. 1972), Supreme Court dismissed an action filed by representatives of deceased occupants of motel in which fire occurred, stating that the negligent issuance of a building permit which allowed the motel to remodel in a manner which violated the Building Code, could not state a cause of action against the City. Two weeks after the final inspection, a fire broke out in the motel.

> The purpose of a Building Code is to protect the public . . . Building Codes, the issuance of building permits, and building inspections are devices used by municipalities to make sure that construction within the corporate limits of the municipality meets the

standards established. *As such, they are designed to protect the public and not meant to be an insurance policy by which the municipality guarantees that each building is built in compliance with the Building Codes and Zoning Codes.* The charge for building permits is to offset expenses incurred by the City in promoting this public interest and is in no way an insurance premium which makes the City liable for each item of defective construction in the premises. (199 N.W.2d 158, at 160, emphasis supplied).

25. *Montana:* Section 2-9-101 through 2-9-805. Every governmental entity is subject to liability for its torts and those of its employees . . . whether arising out of a governmental or proprietary function . . . (2-9-102); limitation on liabilities $300,000 per claim and $1 million per occurrence (29-104); effective 1977; written notice of claim required (2-9301).

26. *Mississippi:* Governmental immunity retained, both for state and local government, with some exceptions when there is insurance for airports, community hospitals, hospitals and county motor vehicles.

27. *Missouri*: Section 71.185 "Tort Liability for Governmental Acts"; waives governmental immunity only to the extent that insurance, required by all municipalities, so provides.

28. *Nebraska*: Section 23-2401 through 2420 "Political Subdivisions Tort Claims Act" states no political subdivision and no public employee shall be sued except as allowed by the statute; exempts "any claims based upon the exercise or performance or the failure to exercise or perform a discretionary function . . . whether or not the discretion be abused"; requires notice of claim; also prohibits any claim upon "misrepresentation or deceit".

29. *Nevada*: Chapter 41.031 et seq. waives immunity from liability for the State and its subdivisions, except for *"failure to inspect any building, structure or vehicle . . ."*.

30. *North Carolina*: Section 160A485 "Waiver of immunity through insurance purchase"; waives immunity "only to the extent that the City is indemnified by the insurance contract from tort liability"; notice of claim required; judgments are limited by the amount of the insurance policy; does not waive immunity prior statutes or "common law"; statute has been interpreted to mean that the municipality is not liable for torts of its employees or agents committed while performing a governmental function. *Galligan v. Town of Chapel Hill*, 171 S.E. 2d 427 (1970).

31. *North Dakota*: Section 32-12.1-01 through 12.115 "Liability of political subdivisions"; political subdivisions are liable for negligence "if a private person, would be liable to the claimant"; maximum liability is $250,000 for injuries, $500,000 for all injuries arising out of a single occurrence; no liability for negligent act if discretionary, or *"the decision . . . to grant . . . refuse to grant . . . or to revoke any license, permit, order or other administrative approval or denial"*. (32-12.1-03); effective 1977.

32. *New Hampshire*: Chapter 31 Section 104 "Liability of Municipal Executives" requires indemnity of any public official acting in his official capacity in good faith and within the scope of his authority.

Hurley v. Town of Hudson, 296 A.2d 905 (N.H. 1972). Purchasers of lot within subdivision sued town and developer, alleging that improper storm drainage system

caused constant flooding damage to houses. The Supreme Court held that the issuance of various approvals by the town could not create liability as they were "discretionary", and negligent enforcement of regulations does not create a private cause of action against a town. "To hold a town liable in tort for failure to enforce its ordinances would discourage the enactment of many important ordinances, and far more persons would suffer if government did not perform these functions at all than would be benefited by permitting recovery in those cases where the government is shown to have performed inadequately." (296 A. 2d 905, at 908).

33. *New Jersey*: Chapter 59 Section 2-1 et seq. "Tort Claims Act" follows California Tort Claims Act enacted in 1963; provides immunity for descretionary activities; provides for immunity for "an *injury caused by the issuance, denial, suspension or revocation of . . . any permit, license, certificate, approval order . . . ;* also provides immunity for "failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property".

Bosch v. Hain, 445 A. 2d 465 (N.J. 1982). Victims of fire in tenement house alleged that the City inspector inspected a tenement house, found approximately 190 violations, many of which were characterized as "life threatening", issued a "Notice of Violation", and allowed the tenement house owner 60 days to remedy the violations. Within that 60 day time period, a fire occurred which killed 21 people. The Plaintiffs argued that the duties were purely ministerial, aand having determined that violations existed, the inspector failed to carry out appropriate procedures in assuring that the defects were cor-

rected properly. The New Jersey Court cited many California decisions, and cited the California Law Revision Commission pages 817-818.

> Public entities and public employees should not be liable for failure to make arrest or otherwise to enforce any law. They should not be liable for failing to inspect persons or property adequately to determine compliance with health and safety regulations. *Nor should they be liable for negligent or wrongful issuance or revocation of licenses and permits.* The government has undertaken these activities to ensure public health and safety. *To provide the utmost public protection, governmental entity should not be dissuaded from engaging in such activities by the fear that liability may be imposed if an employee performs his duties inadequately.* Moreover, if liability existed for this type of activity, the risk of exposure to which a public entity would be subject would include virtually all activities going on within the community. *There would be potential governmental liability for all building defects, for all crimes and for all outbreaks of contagious disease. No private person is subjected to risks of this magnitude.* In many of these cases, there is some person (other than the public employee) who is liable for the injury, but liability is sought to be imposed on the government for failing to prevent that person from causing the injury. *The commission believes that it is better public policy to leave the injured person to his remedy against the person actually causing the injury than it is to impose an additional liability on the government for negligently failing to prevent the injury.* And where no third party is liable—as in the case where a license application is denied—the aggrieved party has ample means for obtaining relief in the Courts other than by tort actions for damages. *Far more persons would suffer if government did not perform these functions at all than would be benefited by permitting recovery in those cases where the government is shown to have performed inadequately.* (445 A. 2d 465, at 471, emphasis supplied).

The Court further cited a section of the California "Report of the Attorney General's Task Force on Sovereign Immunity" at page 214 (1972): "they were caught between the Scylla of making no inspection and the Charybdis of actively abating every failing which inspection uncovered—before harm resulted from that condition. Such a result would be unthinkable—short of legislative action which could provide mechanism for responding to the liability at the same time the duty is created." (445 A. 2d 465, at 472-3).

Panepinto v. Edmart, Inc., 323 A. 2d 553 (N.J. 1974). Homeowners sued developer, general contractor, City, and City engineer, caused by flooding by sewer backups, resulting in basement floodiing in all homes and subdivision. The City was found negligent because it should have known the sewer system was inadequately designed. The Appellate Court reversed, stating that

> here, the municipal Defendants did not plan or install the sewer systems . . . The City engineer and City's planning board were negligent in approving and accepting the plans submitted . . . and in their inspection and supervision of the installation of the original sewer . . . However, the decisions thus made and conceded in good faith by the public officials involve the performaance and exercise of discretionary quasi-judicial functions and duties, and so afford no basis for imposing liability aand damages either on the engineer or his employer, the City, even if they or either of them acted negligently in the performance of those functions. (323 A. 2d 533, at 536).

Fiduccia v. Summit Hill Construction Company. 262 A. 2d 920 (N.J. 1970). Plaintiffs claimed that the municipality negligently issued a certificate of occupancy, be-

cause the land was improperly graded, and the draining system improperly installed, so as to cause continual flooding. The Court rejected the claim, stating:

> Certainly it was foreseeable that a landowner might rely upon a certificate of occupancy . . . The basic question, therefore, is whether this is the kind of activity for which a municipality should be held responsible under ordinary principles of tort liability. Clearly there are areas in which governmental activities involve questions of discretion and judgment for which, in the absence of bad faith, corruption, oppressive conduct, or other abuse of power, there is no immunity from tort liability. In my view, this is the kind of case where there should be municipal immunity. *While issuance of a certificate of occupancy does not involve planning or policy functions, it does entail the exercise of discretion.* Not only must the building inspector determine whether there has been compliance with building regulations and health regulations, but whether the structure com complies with the requirements of the zoning ordinance. The books are replete with zoning cases which demonstrate that this can be a task requiring considerable skill. The building inspector does more than mechanically apply existing regulations; he must often exercise judgment in difficult areas. While it can hardly be said that his powers are quasi-judicial, it seems improper to expose a municipality to the possibility of tort liability for errors in the exercising of such judgment, particularly since it is now responsible for the acts of all of its agents . . . *The certificate of occupancy is merely a testimonial that the property is being used in compliance with the applicable ordinances. It is issued for the protection of the municipality as a whole, not for the benefit of the landowner.* Doubtless, the building inspector must use due care in the performance of its functions, but his obligation is to see to it that there has been no violation of municipal ordinances, not to en-

> sure that the building has been constructed in such a manner as to protect the landowner. If, incidentally, the landowner benefits from the activities of the building inspector, this does not give him the right to rely upon the certificate of occupancy for proof of proper construction. . . . For this, the landowner should—and traditionally has protected himself by contract. (262 A. 2d 920, at 921 through 924, emphasis supplied).

34. *New Mexico:* Section 41-4-1 through 41-4-29 "Tort Claims"; any governmental entity or public employee is granted immunity from all liability except as waived by specific sections of the statute, dealing with operation of motor vehicles, maintenance of buildings, public utilities, medical facilities, highways and streets, law enforcement officers, etc.: notice of claim required; maximum liability of $500,000.

35. *New York*: Article 4, Section 50: requires indemnity for public officials, acting in the performance of his duties and within the scope of his employment. Requires notice of claim.

O'Connor v. City of New York, 460 NYS 2d 485, 1983. City Building Inspector issued an approval for a new gas line which exploded nine days after approval, killing 12 persons and leveling a three-story building in Manhattan. The Court of Appeals stated that the negligently issued approval could not subject New York City to liability.

> To subject municipalities to open-ended liability of enormous proportions and with no clear outer limits . . . in addition to imposing a crushing financial burden, might well discourage municipalities from undertaking activities to promote the general welfare. It could also impede municipal officials from allocating

> resources where they would most benefit the public, by making the price concern the evidence of tort liability rather than the promotion of the public welfare. The Court should not take it upon themselves to, in effect, reorder municipal priorities. (460 NYS 2d 485, at 487).

Worth Distributors, Inc. v. Lathen, 464 NYS 2d 435 (1983). Building collapsed in Manhatten, killing four and causing forty-three actions for personal injury to be consolidated. Court of Appeals held that City not liable, despite trial verdict that building inspector knew of crack in weight-bearing wall, but did nothing to remedy it: The building safety code regulations "... were designed to protect the general public, however, and no special relationship has been shown that would establish a municipal duty to the instant plaintiffs in particular" (at page 436). See also *Quinn v. Radler, Bros. Inc.,* 466 NYS 2d 292 (1983) (Summary judgment for city affirmed; fireman owed no duty by city to enforce Fire Safety Code); *Rolfe v. Falconer,* 467 NYS 2d 453 (1983) (complaint dismissed, where owner sued building inspector for negligent issuance of building permit to tenant, who built addition without consent of owner); *Herland Enterprises v. Commander Oil,* 468 NYS 2d 524 (1983) (summary judgment granted to fire department, in suit by property owner claiming negligence in fighting fire); *Garrett v. Holiday Inns, Inc.,* 460 NYS 2d 774 (1983) (Town not liable for deaths in motel fire, where plaintiffs alleged negligent issuance of certificate of occupancy, despite blatant fire safety code violations caused by remodeling of motel; town may be liable to owner, if certificate of occupancy was issued despite knowledge of blatant fire hazards, and owner "justifiably relied" on, page 779).

Sanchez v. Liberty, 366 N.E. 2d 870 (Court of Appeals 1977). Victims of fire in multiple dwelling sued building inspector and other officials, stating that they negligently issued building permit and negligently inspected building which had fire hazards. The Court of Appeals reversed, stating "absent a special relationship creating a municipal duty to exercise care for the benefit of a particular class of individuals, no liability may be imposed upon a municipality for failure to enforce a statute or regulation". At page 783.

Ascrizzi v. Kaufman, 393 N.Y.S. 2d 216 (1977). Plaintiff sued for *wrongful issuance of a certificate of occupancy*, stating that the building inspector certified that a building conformed substantially to the approved plans and specifications filed with the application for a building permit, and with the Building Code, when in fact the building was not hooked into the sewer system, and the Plaintiffs had to pay $60,000 in order to have it hooked up. The Court rejected the claim, stating "It has been well established that where, as here, a municipality acts in a governmental capacity for the protection of the general public, it will not be liable for the failure to furnish effective protection to a particular individual to whom it owes no special duty." (393 N.Y.S. 2d 216, at 218). See also *Sanchez v. Village of Liberty*, 216 N.Y.S. 2d 850 (1961); *Rivera v. City of Amsterdam*, 174 N.Y.S. 2d 530 (1958); *Meadows v. Village of Mineola*, 72 N.Y.S. 2d 368 (1947).

36. *Ohio*: Governmental immunity still in effect, in regard to municipal corporations, except where scattered statutes waive immunity in certain situations: county commissioners may be sued for failure to maintain any public,

state, county road, bridge, ditch, drain or water course (Section 305.12); municipal immunity is waived for municipal hospitals (Section 2743.02B); Section 9.86 states "except for civil actions that arises out of the operation of a motor vehicle . . . no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officers or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, and bad faith, or in a wanton or reckless manner." There is a court of claims procedure as far as the State and State officers are concerned.

Mercer v. U.S., 460 F. Supp. 329 (E.D. Ohio 1978). The Court rejected a wrongful death action of miner, because there was no cause of action under Ohio State law, nor under Federal Tort Claims Act, since the Mine Safety Act was enacted solely to cause mine operators to comply with the safety standards, and the government could not be held liable under the Federal Tort Claims Act for negligent inspections.

> Sound policy underlines the distinction drawn by Ohio law. The purpose and effect of a statutory inspection differs substantially from the purpose and effect of a contractual agreement. When a person contracts with another to maintain and inspect a dangerous device, he voluntarily assumes responsibility for ensuring its safety. A person with whom he contracts pays a consideration for that service in an attempt to shift that responsibility and may reasonably rely on the fulfillment by the contractor of his obligation, voluntarily undertaken, to exercise due care in inspecting and maintaining the device. The responsibilities imposed on an inspector acting pursuant to

> statutory authority are altogether different. (The Mine Safety Act) authorizes the inspections at issue in this case, (and) expressly imposes the sole responsibility for maintaining safe mining conditions directly upon the mine operators. . . . A federal inspector assumes no responsibility to maintain compliance with safety standards upon which the mine operators or their employees can rely. The responsibility remains with the operator and is not shifted to the inspector by the act of undertaking an inspection. (460 F. Supp. 329, at 332).

Shelton v. Industrial Commission, 367 N.E. 2d 51 (Ohio 1976). Plaintiff sued the State Commission in charge of industrial accidents, and various State employees, alleging that State agencies failed to condemn a boiler, which exploded and blinded him, leaving him permanently crippled. The Court of Appeals held that statutes requiring State agencies to inspect and enforce safety standards with respect to boiler were enacted to protect the public generally against unsafe conditions and such statutes were not intended to create duty toward any particular person.

37. *Oklahoma*: 51 Section 151 through 170 "Political Subdivision Tort Claims Act" effective July 1, 1978; waives liability, but maximum claim is $25,000 for property damage, $50,000 for personal damage to one person; $300,000 for any number of claims out of a single accident or occurrence; (effective July 1, 1983 limits raised to $25,000/$100,000/$1 million); no liability for punitive damages; exemptions from liability include "*licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, li-*

cense, certificate, approval, order or similar authority where the authority is discretionary under law;" (Section 155(12)); "Inspection powers or functions, including to make an inspection, or making an inadequate or negligent inspection, of any property . . ." (13); written notice required with 120 days after loss occurs. (Section 156).

38. *Oregon*: Section 30.260 through 30.300 "Tort actions against public bodies"; creates immunity for every public body for torts of its officers or employees arising within the scope of their employment or duties; excepts any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused; maximum recovery is $300.000 for any number of claims arising out of a single accident or occurrence; notice of claim required within 180 days after the alleged loss or injury; no indemnity for wilful or wanton neglect of duty.

39. *Pennsylvania*: Section 8521 through 8526 "Actions against commonwealth parties"; specific categories are spelled out in which immunity is waived, to include vehicle liability; medical professional liability; care, custody of control of personal property, commonwealth real estate, highways and sidewalks, potholes and other dangerous conditions; care, custody or control of animals, liquor store sales, and National Guard activities; limitation on damages is $250,000 per Plaintiff and $1 million in the aggregate.

40. *Rhode Island:* Section 9-31-1 through 9-31-12 "Governmental Tort Liability". The State and any political subdivision is liable "in all actions of tort in the same

manner as a private individual''; limitation of damages is $50,000 for any City or town; the General Assembly may, by Special Act, authorize actions of tort in which the amount of damages may exceed $50,000. Notice is still required. Enacted in 1974.

Ryan v. State Department of Transportation, 420 A.2d 841 (1980). Injured motorist sued registrar of motor vehicles, claiming that the registrar issued a valid driver's license to the Defendant despite a length history of violations, and, because the Defendant's license was reinstated by the registrar after three suspension orders. The Plaintiff claimed that the registrar failed to conduct an investigation required by law, which states that any person who has a license which has been suspended cannot have it reinstated, unless the registrar investigates the ''character, habits and driving ability'' of such person. The Rhode Island Supreme Court affirmed the decision of the trial Court, that the purpose of the statute concerning suspension and reinstatement of drivers' licenses to protect the public at large, and the legislature did not intend to create any individual duty. ''We are unable to conclude, however, that the legislature intended to create a duty running to individual members of the public. Furthermore, such a drastic remedy would likely deter the registry from reinstating any drivers under (the regulations)''. (420 A.2d 841, at 843).

41. *South Carolina:* No Tort Claims Act; Section 111-140 allows any political subdivision of the State to procure insurance in order to protect personnel against tort liability arising in the course of their employment but subsection two of such statute states that this does not con-

stitute "a relaxation of the sovereign immunity of the State".

42. *South Dakota:* Section 9-24-1 through 9-24-6; requires written notice for any action to recover damages for personal injury or death caused by the negligence of any municipality; does not change common law doctrines concerning municipal immunity.

43. *Tennessee:* Section 29-20-101 through 29-20-407 "Governmental Tort Liability"; waives governmental immunity for any negligent act, unless it "arises out of the exercise or performance of the failure to exercise or perform a discretionary function, whether or not the discretion is abused; . . . arises *out of the issuance, denial, suspension or revocation . . . of any permit, license, certificate* . . . ; arises out of a failure to make inspection, or by reason of making an inadequate or negligent inspection of any property" (29-20-205); requires written notice within 120 days after the cause of action arose; no judgment may exceed the insurance coverage carried by any governmental entity. Requiremnet for insurance mandatory, with minimum limits of $20,000 per person; $40,000 per number of claims arising out of one incident; maximum recovery $300,000 for bodily injury or death of any number of individuals arising out of one accident; reduced limits for those towns or cities which are unable to purchase insurance, but must provide self insurance. (Section 29-20-403); effective 1973.

44. *Texas:* Section 6252-19 "Tort Claims"; waives governmental immunity for each unit of government and its employees, only for negligence "acting within the scope of his employment or office arising from the operation or

use of a motor-driven vehicle and motor-driven equipment . . . under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this State . . ."; also, waives immunity for death or personal injuries caused from "some condition or some use of tangible property, real or personal, under circumstances where such unit of government would be liable . . . if a private person would be so liable"; limit of $100,000 per person and $300,000 per incident; written notice of claim required within six months from the date of the incident.

45. *Utah:* "Governmental Immunity Act" Section 6330-1 through 63-30-34; includes cities and state agencies and employees; waives immunity from suit of all governmental entities for injury approximately caused by a negligent act or omission of an employee with certain exceptions, to include any discretionary act, whether or not the discretion is abused; any intentional tort; any act that *"arises out of the issuance, denial, suspension or abrogation, or by the failure of refusal to issue, deny, suspend or revoke, and permit, license, certificate, approval, order, or similar authorization"* (63-30-10(3)); requires written notice of claim within one year after the cause of action arises, excludes liability if employee was liable because of "gross negligence, fraud, or malice"; maximum liability determined by insurance policy; cities required to have minimum insurance of up to $300,000 for all claims arising out of one occurrence.

46. *Vermont:* Title 29 Section 1403 waives governmental immunity only if a municipal corporation has an insurance policy; sovereign immunity is waived only to the

extent of the coverage of the policy. There is not requirement for a city to carry liability insurance, even on its motor vehicles and drivers. *Medler v. Aetna Insurance Company,* 248 A.2d 740 (1968).

47. *Virginia:* Section 8.01-222 requires prior notice of any claim to municipality within 90 days of claim; governmental/proprietary distinction still in effect. Therefore, suit allowed only if proprietary function.

48. *Washington:* Section 4.96.010 through 040 "Actions against Political Subdivision"; waives governmental immunity for damages arising by tortious conduct of City or officers "as if they were a private person or corporation"; requires filing of notice of claim; notice of claim required within six months immediately prior to the time the claim arose; effective 1967.

Weston v. New Bethel Miss. Baptist Church, 598 P. 2d 411 (Wash. 1979). Church applied for and received building permit for construction of parking lot and concrete "rockery"; it collapsed, causing property damage to adjoining property owners; Court of Appeals affirmed summary judgment granted for City, on claim that City was liable because it negligently issued a building permit, for a structure which violated the building code. The building permit allowed the structure to be 16 feet in height; in fact, it was 22 feet high, 6 feet higher than permitted.

Georges v. Tudor, 556 P. 2nd 564 (Wash. 1976). Plaintiff sued for damages arising out of the collapse of a building under renovation; Plaintiff claimed that the city was negligent in issuing a building permit and in inspecting the privately owned building which collapsed. The Court held that the enforcement of the building code through

periodic inspection of buildings creates only a public duty, and not a private duty. The Court held that this did not fall in the general exception recognized in Washington that "where a relationship exists or has developed between an injured Plaintiff and agents of the municipality" a private duty may be created to perform a mandated act for the benefit of that private party. At page 567.

49. *West Virginia:* Section 8-12-7 permits municipalities to purchase insurance for public liability.

50. *Wisconsin:* Section 893.80 et seq "Claims against Governmental bodies, officers and employees" provides for broad waiver of immunity, with none of the usual exceptions; requires written notice written 120 days; $50,000 maximum recovery; exempts only "acts done in the exercise of legislative, quasi-legislative; judicial or quasi-judicial functions."